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3	586
22	333

REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA.

BY W. PENN. CLARKE,
REPORTER.

VOL. III.

NEW YORK:
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ALBANY:
GOULD, BANKS & CO., 475 BROADWAY.

1857.

Rec June 5, 1860

JUDGES OF THE SUPREME COURT.

Hon. GEORGE G. WRIGHT, Keosauqua, Chief Justice.
" WM. G. WOODWARD, Muscatine, } Justices.
" L. D. STOCKTON, Burlington. }

CLERK OF THE SUPREME COURT.

LEWIS KINSEY, Wapello.

ATTORNEY-GENERAL.

SAMUEL A. RICE, Oskaloosa.

REPORTER.

W. PENN. CLARKE, Iowa City.

RULES OF THE SUPREME COURT.

AT the December Term, A. D. 1856, the following additional rules were adopted by the Supreme Court:

RULE 21. Copies of records and arguments shall be paged at the bottom of the page; and copies of record of more than five pages, shall contain an index referring to the different pleadings and papers. Briefs and arguments are required to be signed by the counsel, stating whether for the plaintiff or defendant.

RULE 22. In criminal causes, the plaintiff in error shall cause the transcript to be filed with the clerk of the Supreme Court, at least five days before the day set for the district from which the cause may be brought.

RULE 23. In criminal causes, the recognizance of the defendant, and in civil causes, the supersedeas bond, (if one is filed,) or a certified copy thereof in either case, shall be sent up, although the party do not order it.

RULE 24. Transcripts of records, prepared for the Supreme Court, shall be made substantially in the manner following, that is to say:

STATE OF IOWA, }
——— *County.* }

Pleas before the District Court of Iowa, at a term begun and holden in the county of ———, on the — Monday of ——, A. D. 18—, before the Hon. E. F., Judge of the —— Judicial District, of the state of Iowa.

A. B.
v. } At law or in chancery, as the case may be.
C. D.

Be it remembered that heretofore, to wit: on the — day of ——, A. D. 18—, a petition was filed in the office of the clerk of the District Court, in and for the county of ———, in the words and figures following, to wit:

[Here copy the petition in full.

Proceed in the same manner in relation to whatever paper is filed—such as the original notice, or a petition for attachment, &c.

If the cause has come from any other county, by change of venue, commence as above: "Be it remembered," and state, in like manner, all that was done in the county *from* which the venue was changed.]

And afterwards, there was filed in the office of the said clerk, a notice in the words and figures following, to wit:

[Here copy the notice *in full.*]

Upon which, (or attached to which,) was a return as follows:

[Copy the officer's return, with all indorsements in full. If the suit be by attachment, copy the petition or affidavit, writ of attachment, bond, notice, return, &c.

Copy all indorsements upon the *face* of the transcript, or copy of record, and not upon the back of the leaf.]

And afterwards, to wit: on the —— day of ——, A. D. 18—, there was filed in the office of the said clerk, an answer in the words and figures following, to wit:

[Copy in full.

Should the clerk doubt what the paper properly is, let him call it a *paper*, in the words and figures following, &c.

Where a paper is filed in term time, add the day of the term to the day of the month, (as in the next form.)]

A. B. v. C. D. } And afterwards, to wit: on the —— day of ——, A. D. 18—, it being the ——— day of the —— term of the said court, the said A. B. (or plaintiff) filed the following demurrer to the answer of the said C. D. (or of the said defendant), to wit:

[Copy the demurrer.]

If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance a demurrer, plea and answer, and the transcript may say:

——— (stating the date,) ——— the said C. D. (or defendant) filed his demurrer, plea and answer, which are filed *de bene esse*, (or, subject to the rule.)

A. B. v. C. D. } And now on this —— day of ———, A. D. 18—, it being the ——— day of the said —— term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer. (Copy the entry of the proceedings of the court, sustaining or overruling the demurrer.)

And afterward on the —— day of the said ——, it being the ——— day of the said term, the said plaintiff filed his replication in the words and figures following, to wit:

[Copy the replication.]

And afterward on the same day, the said defendant filed motion and affidavit for a continuance, as follows, to wit:

[Copy it.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that this cause be continued until the next term of the court, (at the cost of the defendant.)

DISTRICT COURT. ——— *County.* } ——— Term, A. D. 1857.

A. B. v. C. D. } And now on this ——— day of ———, it being the ——— day of said term, this cause coming on for trial, came a jury, to wit:

. . . . . .

twelve good and lawful men, who were sworn well and truly to try the issue between the said parties, and a true verdict to render, according to the law and evidence given them in court. Having heard the evidence, the argument of the counsel and the instructions of the court, the jury retired to consider on their verdict. And afterward on the same day, the jury returned into court and rendered their verdict, as follows:

[Copy it as entered of record.]

Or if the jury does not return until the next day.

A. B. v. C. D. } And now on this —— day of ———, the jury in the foregoing cause returned into court and rendered their verdict as follows:

[Copy as put in form by the court.]

A. B. v. C. D. } And afterward on the —— day of ———, A. D. 18—, being the —— day of said term, the plaintiff (or defendant) filed his bill of exceptions, in the words and figures following, to wit:

[Copy at large.]

A. B. v. C. D. } Now on this ——— day of ——— A. D. 18—, the plaintiff filed his motion for a new trial, as follows, to wit:

[Copy in full.]

A. B. v. C. D. } And now on this ——— day of ———, A. D. 18—, this cause coming up for hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled, (or as the record entry may be.)

Then add final entries of record, comprising final judgment, &c., and certificate of clerk.

NOTE.—The foregoing is but an *example*, and is to be varied according to the circumstances. The actual facts of the case, will dictate *what* is to be done, but in all cases it is to be done substantially in *like manner* with the above, giving the proper order and date of the filing of papers, and incorporating them at the proper dates into the proceedings of the court.

It will be understood that it is not necessary in all instances, to send up the *whole* of the record, but the clerk may be guided by the directions of the appellant, under § 1976 of the Code. And he will observe § 1977, as to immaterial papers. Some qualifications are added in the prior rules.

CASES REPORTED IN THIS VOLUME.

ERRATA.

Page 65, in the fifth line from the bottom, for "the," read *their*.
" 82, in the fourth line from the top, for "this," read *that*.
" 83, at the end of the eighteenth and beginning of the nineteenth lines from the top, for "premises," read *persons*.
" 84, in the eighth line from the top, the word "not" should be omitted.
" 162, in the ninth line from the bottom, the word *of* should be inserted between the words "custom" and "requiring."
" 190, in the thirteenth line from the top, for "ever," read *even*.
" 206, in the seventh line from the bottom, for "relieved," read *released*.
" 207, in the fourth line from the top, for "among," read *after*.
" 208, at the beginning of the seventh line from the bottom, for "or," read *on*.
" 214, in the thirteenth line from the top, for "there," read *then*.
" 382, in the ninth line from the top, for "Clausern," read *Claussen*.
" 394, in the third line from the top, for "KcKinlay," read *McKinlay*.

In *Frederick* v. *Cooper et al.*, page 171, WRIGHT, C. J., having been of counsel, took no part in the decision.

In *Stewart* v. *Ewbank*, page 191, the opinion was delivered by WRIGHT, C. J.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA;

IOWA CITY, JUNE TERM, A. D. 1856,

In the tenth year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.
" WM. G. WOODWARD, } JUSTICES.
" L. D. STOCKTON, }

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112 717
3 1
114 433
3 1
120 608
3 1
124 27

McMANUS *v.* CARMICHAEL.

Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily, the only one.

But however this may be, that test is not applicable to the Mississippi river.

The common law consequences of navigability, attach to the legal navigability of the Mississippi.

The term *navigable*, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in legal sense, to saying that they are navigable.

Yet the navigability, in fact, is the leading idea, and is the ground of their publicity.

The ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it.

It is navigability *in fact*, which forms the foundation for navigability *in law*, and from the *fact*, follows the appropriation to public use, and hence its publicity and legal navigability.

The real test of navigability in this country, is ascertained by *use*, or by public act or declaration.

The acts and declarations of the United States declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible.

The rule that a grant is to be construed most strongly against the grantor, does not apply to public grants.

The government being but a trustee for the public, its grants are to be construed strictly.

Grants of land by the United States, by patent, have relation to the survey, plats, and field notes.

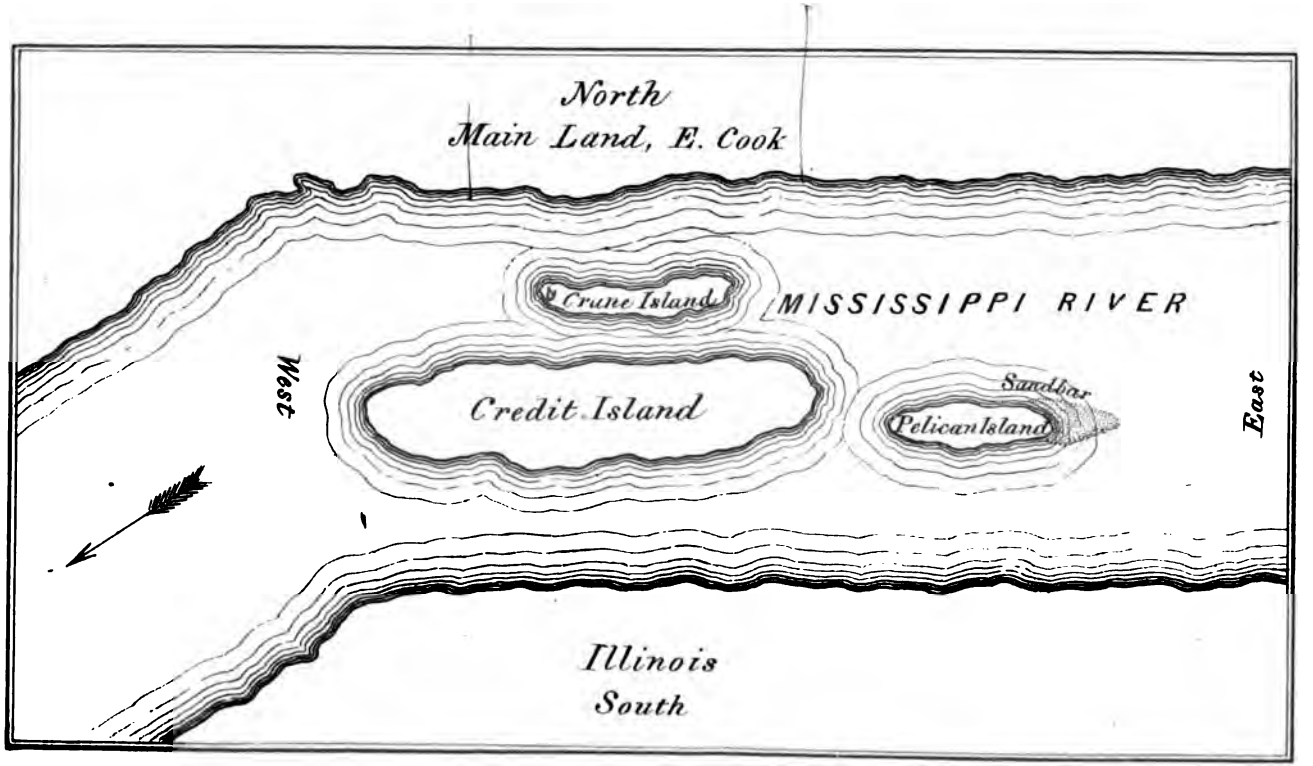
The common law knows but two lines—the *medium filum aquæ* and high water. If the stream be navigable, the boundary of the adjoining land is the one; if not navigable, the boundary is the other.

By the common law, the riparian proprietor on navigable waters, owns to high-water mark only, and this rule applies to the Mississippi river.

Appeal from the Scott District Court.

THIS was an action of trespass, for taking two loads of sand from the soil of the plaintiff, McManus. The *locus in quo* is in Scott county, and in the Mississippi river. The river, at this part of it, and for nearly thirty miles, runs nearly from east to west. In the middle of the river is Credit island, containing about two hundred and sixty acres. Between Credit island and the main land, on the north, or Iowa side, is a very small island, called Crane island, containing about seven acres. Off the east end of Credit island (it being up stream), is Pelican island, containing about eleven acres. The positions of these islands are represented on the annexed plat.

In 1837 or 1838, the United States surveyed, and in 1840 sold, the public lands in Scott county. They surveyed the main land and Credit island, but did not survey the other two small islands, which overflowed; and which are now called Crane and Pelican. The main land on the Iowa or north side, opposite Pelican island, and the *locus in quo*, was sold to E. Cook, and Credit island to A. H. Davenport. At a subsequent date, Crane and Pelican islands were surveyed, and the latter sold to the plaintiff by patent, dated April 10th, 1849, in which the description is as follows:


North
Main Land, E. Cook
Crane Island
MISSISSIPPI RIVER
West
Credit Island
Sandbar
Pelican Island
East
Illinois
South

"Lot number three and Pelican island, of section three, in township seventy-seven, north of range three, east of the fifth principal meridian, * * * according to the official plat of the survey of the said lands returned to the general land office of the Surveyor-General," &c. At the east or upper end of Pelican island, is a *sand-bar*, which is exposed at low water, and which is the *locus in quo*. From this sand-bar, between high and low-water mark, the defendant took two boat-loads of sand, taking it from the outside of the meanders of the survey by the United States. The whole island is subject to overflow at unusually high water.

The plaintiff has no other possession than a constructive one, arising from title, if he has this; and the object of this suit is to try his title to the sand-bar, outside of the lines of the survey, between high and low water, up stream. The court found for the plaintiff, and judgment was rendered in his favor, from which the defendant appeals.

Whitaker & Grant, for the appellant.

There are two propositions which we advance in relation to the riparian ownership of lands on the Mississippi, one of which must be true; and if either is, the plaintiff cannot recover in this action.

First. That the Mississippi river is a navigable stream; and as a corollary from this, that its bed belongs to the public, and the plaintiff has no right of exclusive possession and ownership beyond the lines of his survey, between high and low-water mark.

Second. If the Mississippi river is not navigable, in the supposed common law sense of that term, then the riparian owner of the bank owns to the centre of the stream; and the government, having conveyed the bank, have also conveyed the whole land, to the middle thread of the stream, and the plaintiff could acquire no title by a subsequent survey and sale to him.

1. There are many dicta, both in the text-books and judicial decisions in the United States, that the word "navigable," when applied to a river, means a river where the tide

ebbs and flows, and that in such rivers only the soil belongs to the public; whereas those large fresh water streams which are navigable in fact, are not navigable in law, and the public have only an easement in them, subject to the rights of soil in the riparian owner. See Angell on Tide Waters, 75. "It is a settled principle," says Kent, "in the English law, that the right of soil of the owners of land, bounded by the sea, or in navigable rivers, where the tide ebbs and flows, extends to high water, and the shore below common, but not extraordinary, high-water mark, belongs to the state, as trustee of the public; but grants of land, bounded on rivers, above tide water, carries the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly show otherwise, and where such river is navigable for boats and rafts, the public have an easement therein." 3 Kent, 521; citing *Rex* v. *Smith*, Douglass, 425; 3 Caines, 318; *The River Banne*, Davies, 152.

This proposition, which has followed the words of the Irish reporter, Davies, is a mere *dictum*, and there is, in fact, no such common law rule, as we will now show, by reason and authority. The other English reports lay down no such doctrine, nor does Lord Hale. Woolrych, in his very able treatise on the Law of Waters, gives the following definition of a public or navigable river: "Rivers are either public, as where there is a common right of navigation exercised, and then *the soil* is in the king, as the lord of the manor; or private, where the soil is the property of the individual who owns the land on both sides, or of each proprietor, *ad medium filum aquæ*, where the same is not the owner of the shore on either bank." "A public navigable river frequently owes its title to be considered as such, from time immemorial, by reason of its having been an ancient stream, but very many acts of Parliament have been passed, to constitute those navigable rivers which were not so before. Waters flowing inland, where *the public* have used to exercise a free right of passage, from the time whereof the memory of man runs not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most un-

failing test to apply, in order to ascertain a common right. Others have attempted to apply other tests, and frequently without success. Thus, it has been said, that in the case of a river, which flows and reflows, and is an arm of the sea, it is *prima facie* common to all (HOLT, J., 1 Modern, 105); and upon the strength of this position, it was urged on one occasion, that an action could not be sustained against the corporation of Lynn, for the non-repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein, &c.; but this argument was treated by the court as a fallacy; for they denied that the flowing and reflowing of the tide constitute a navigable river, there being many places where the tide flows, which are not navigable." *Lord Mayor of Lynn* v. *Turner*, Cowper, 86. Mr. Justice BAILEY said that the *prima facie* evidence of the flux and reflux of the tide, depends on the situation and nature of the channel. If it is a broad, deep channel, calculated for the purposes of commerce, it would be natural to conclude that it had been a public navigation. *King* v. *Montague*, 1 E. C. L. 418; 4 Barn. & Cres. 602. A river has been defined to be a running stream, pent in on either side with walls and banks. Woolrych on Waters, 40. "Banks of rivers contain the river in its natural channel when there is the greatest flow of water." 13 Howard, 391. "When banks of rivers are spoken of, those boundaries are meant which contain their waters at the highest flow, and in that condition they make what is called the bed of the river. Rivers have banks, shores, waters, and a bed; and the water line in the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low, at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture." *Howard* v. *Ingersoll*, 13 Howard, 415. "By the civil law, all rivers in which the flow of waters was perennial, belonged to the public, and the public right extended to the use of the banks, as well as to fishing. Navigable rivers, in the language of the civil law, are not merely rivers in which

the tide ebbs and flows, but rivers capable of being navigated in the *common sense* of the term. In the words of the digests, *statio itur re navigatio.* Angell on Tide Waters, 79. On another occasion, in this court, we called in vain for any statute establishing the common law in Iowa.

Are we to be told that the Mississippi river is not a navigable stream, and its bed private property? The father of the floods, private property! The great river, to see which the conqueror of Florida periled the lives of his followers, to find for himself a grave in its waters, instead of gold in its sands, belongs to every petty owner who pays a dime for the land on its banks! The river, which carries to the sea the products of millions of people, the boundary of states without number; which carries to a single port commerce numbered by hundreds of millions of dollars, and numbers the ships which float on its waters by thousands, cannot be private property. We know that men, with the wealth of Crœsus, and the genius of Archimedes, have spanned its waters with a bridge. So has science bridged and tunneled the Thames, at London, and the thundering car has swept across the straits of Menai, and Niagara at the falls; but they are navigable streams, and the father of waters has yielded to the genius of progress, not to diminish, but increase, the trade and intercourse on this great highway of the republics which have grown, and will continue to grow, on its borders.

As to the principle, whether any of the great inland rivers of America, with their beds below high-water mark, belong to the public, it would be useless for us to deny that the courts of the states are very much divided. All of them, without exception, have mistaken the common law rule. Some of them have had the good judgment to apply to them the common sense rule. In the following states, the doctrine has been held, that the riparian proprietor on our great inland rivers, owns to the middle of the stream:

New York. The cases here have been somewhat conflicting, but have ultimately settled in favor of the *ad filum medium viæ.* Angell on Water Courses, 562; *Palmer* v.

Mulligan, 3 Caines, 307; 10 Johns. 236; 17 Ib. 15; 20 Ib. 90; 6 Cowen, 518; 5 Wendell, 423; 13 Ib. 355; 5 Paige, 137; 9 Ib. 547; 17 Wendell, 574; 26 Ib. 404.

Massachusetts. 17 Mass. 298; 1 Pickering, 180; 5 Ib. 199; 20 Ib. 186; 5 Ib. 492. Bank boundary limits to bank and excludes the stream. *Jackson* v. *Hathaway*, 17 Mass. 288.

New Hampshire. 3 New Hamp. 321; 9 Ib. 461; 2 Ib. 369.

Missouri. *O'Fallon* v. *Daggett*, 4 Missou. 343. In this cause, the court decided that the riparian right extended to low-water mark, because the king of Spain had made an express grant to Yosti, to low-water mark. See

Maine. 3 Greenleaf, 269; 7 Ib. 273; 8 Ib. 138; 2 Fairfield, 278.

Connecticut. 2 Conn. 48; 9 Ib. 38; 7 Ib. 186; 8 Ib. 231. – See 24 Conn 462

Maryland. *Brown* v. *Kennedy*, 5 Harris & John. 195.

Virginia. The cases conflict. There is a case in Randolph looks one way, and a case in Call the other.

Ohio. *Gant* v. *Chambers*, 3 Ohio, 495; 11 Ib. 31; 16 Ib. 540.

Indiana. 3 Blackford, 193.

Illinois. *Middleton* v. *Pritchard*, 3 Scam. 500.

Mississippi. *Morgan* v. *Reading*, 3 Smedes & M. 306. The cases in Illinois and Mississippi are by far the ablest on this side of the question, and are highly commended by Kent. We think the argument of Depew, counsel, in favor of the high-water line, more able than Judge SHARKEY'S opinion on the other side.

On the other hand, the following states hold to the reverse of this doctrine, and that the bed of the stream belongs to the public. In some cases they limit at low water, but that limitation is in consequence of the words of the grant or legislative enactment.

Pennsylvania. *Carson* v. *Blazer*, 2 Binney, 475; *Shunk* v. *Schuylkill Manf. Co.*, 14 Sergeant & Rawle, 71; 9 Watts, 228; 8 Ib. 434.

North Carolina. 2 Devereux, 30; 3 Ib. 59; *Collins* v. *Benbury*, 3 Iredell, 281; 5 Ib. 118.

South Carolina. *Cotes* v. *Waddington*, 1 McCord, 581.

Tennessee. *Elder* v. *Barnes*, 6 Humphrey, 358.

Alabama. *Brittock* v. *Wilson*, 2 Porter, 336; *Major* v. *Erelara*, 9 Ib. 577.

Michigan. *Laplaisance Bay Co.* v. *Munroe*, 1 Walker, 155. This case takes the most rigid view of any yet cited. It takes the ground that the party only purchases to high water, and he is limited by his grant.

Iowa. *Moffitt* v. *Brewer*, 1 G. Greene, 348.

United States. *Bowman* v. *Walker*, 2 McLean, 376; *Pollard* v. *Hogan*, 3 Howard, 212; *Goodtitle* v. *Kibbe*, 9 Ib. 471; *Propeller Geneva Chief* v. *Fitzhugh*, 12 Howard, 458; *Howard* v. *Ingersoll*, 13 Ib. 381.

The authorities on the "navigable" side of this question, all take the ground that the quality of the water can make no difference as to its capacity to float a ship; and that where the stream is navigable, its bed, which includes all between ordinary high-water mark, belongs to the public. The opinion of Judge McLean, with a full knowledge of the Ohio decisions, should have great weight.

The Mississippi river has been declared to be navigable in the treaties with France and Spain, and various acts of Congress. See 8 Laws U. S. 140; 3 Ib. 349, 543; 2 Ib. 642, 703, 747. There is, however, another authority in favor of this view of the case, which admits of no doubt. The cases in 1 Walker, 155, and 1 G. Greene, 348, are based on the acts of Congress in relation to surveys and sales of the public lands. The acts of Congress provide, that when the streams on the public lands are navigable, they are public highways—they belong to the public; and where they are not navigable, instead of the common law rule of ownership to the middle of the stream, that it shall be common to both. Gordon's Digest, 360; 1 U. S. Laws, 468, 491; 2 Ib. 299, 358; 5 Ib. 743. The acts of Congress above referred to, are extended to the state of Iowa. 5 U. S. Laws, 243. When the United States survey a navigable stream, they survey

and sell only to the top of the bank. How can the purchaser own beyond his grant, into the water, either to low water, or the centre of the stream? This statute means something more than a mere easement in the land of navigable waters, viz: that the public had the easement without reservation. It is true, we have not been able to impress on the court below, or the counsel on the other side, that this act establishes and limits the ownership of streams. It is often a convenient way to parry the force of a blow, to inquire who struck it. If the act of Congress intended that ownership should extend to the middle of a navigable stream, why do they not survey and sell it? What else can the act mean? Suppose A. sells B. a tract of land, reserving eighty feet on the south side, for a street forever: will any man say that in such case B. owns to the middle of the street, or any part of it.

But the court may ask, why do we wish to limit the ownership on navigable waters to high-water mark? The 3 Kent, 528; *Middleton* v. *Pritchard*, 3 Scammon, 510; *Morgan* v. *Redding*, 8 Smedes & Marshall, 306, give the riparian owner to the centre, and, of course, all the intervening islands. *Deerfield* v. *Arms*, 17 Pickering, 41, and *Adams* v. *Frothingham*, 3 Mass. 352, decide this cause in favor of the defendant. The United States surveyed and sold the shore and Credit island, and if the common law rules under our interpretation, prevail, the title to the land in controversy belongs to Ebenezer Cook, and not the plaintiff. If the riparian ownership on the Mississippi river is not limited to high-water mark, then the ownership must extend to the medial line, and whoever buys the shore, buys all the islands not then surveyed, and by such survey shown to be reserved and sold separately. *Middleton* v. *Pritchard* is good law, if the Michigan decisions are not. In those states where the line goes to low-water mark, it is so made by the act of the legislature (see HALL'S opinion in 2 Devereux, 30, citing the act of the North Carolina legislature), or by the terms of the grant, if the shore, as in 4 Missouri. There is no rule of interpretation of a grant, which admits of an

extension to low water, neither by the common law nor the civil law.

But how can the plaintiff claim, north of his line, up stream. If his doctrine be true, if the sand-bar in low water extended to St. Peters, he would own it. No matter which rule this court adopts, the plaintiff has no title to the sand-bar between high and low-water mark, outside his survey. The doctrine of alluvion and accretion does not apply to any such case. Alluvion and accretion allude to the increase of the land, placing it above high-water mark, adding to the land above water. A man has no more right to call the shore between high and low-water mark, alluvion or derelict, than he has to call the sea shore or sands, between the ebb and flow of the tide. When islands are formed in navigable waters by the deviation of the water, or by the collection and aggregation of sands and other substances, they belong to the state. Angell on Tide Waters, 267. Alluvion is when the sea, by casting sand and earth, increases the land by degrees, which consequently *protrudes* itself out further than its ancient bounds. Woolrych on Waters, 34, margin; Angell on Tide Waters, 43, 52.

It is claimed in 3 Smedes & Marshall, 306, that the public have only an easement in the river, as a highway. Now, in highways of any kind, where the sovereign has sold the land, and in right of eminent domain, takes a highway as an easement, when the road ceases, the land reverts. The case is different where the fee has never been out of the sovereign; as for instance, where the sovereign sells by metes and bounds, reserving eighty feet wide for a highway. It is nonsense to talk about an easement in the eighty feet. An easement is a right to pass over another's soil. One cannot have an easement in his own soil. In the Mississippi river the fee never was out of the sovereign. It was declared and made a highway before the grant. If an island spring up in it, or its channels go dry, they belong to the sovereign, because the fee never has been anywhere else. How would it be in the Albemarle sound, or Chesapeake bay, where there is no tide?

The patent calls for the land by the survey, by the field notes. The government never measures and sells the fee of the soil of navigable rivers.

Cook & Dillon, for the appellee.

We shall endeavor to establish the following propositions:

1. That the *alluvion* of banks and islands belongs to the riparian proprietors, whether outside of the meanders of the official surveys or not. Angell on Water Courses, §§ 53, 54, 55. The doctrine of the civil law is this: "That ground gained on a river by alluvion, or imperceptible increase, belongs to the owner of the adjoining land, *jure gentium*. 3 Kent's Com. (7th ed.) note to 519, citing Just. Inst. 2, 1, 28; Dig. 41, title *De. Æq. Rer. Dom.* 7, 1; Puff. 4, 7, 12. This is the common law, also. Bracton, book 2, chap. 2; Hale's *De Jure Maris*, c. 6; 2 Black. Com. 261; *King* v. *Yarborough*, 3 Barn. & Cres. 91; 1 Dow. (N. S.) 178, *S. C.; New Orleans* v. *U. S.*, 10 Peters, 662; Schultes on Aquatic Rights, 115, 118; *Deerfield* v. *Arms*, 17 Pick. 41; 2 Public Land Opinions and Instructions, 758, also 850; 3 Scam. 522, as to ownership of alluvion. Pelican island, since its survey in 1846, has considerably increased in size, from gradual growth and deposit; but perhaps, in the next nine years, it will diminish in size as much, or more, than it has increased during the last nine. It is admitted that the sand was taken by the defendant, between high and low-water mark, off of said island, but he claims that this is outside of the meanders of the original survey. Suppose it is: that does not make the growth of the island the defendant's. It was originally meandered along the water, and if the island should grow to twice its size at the time of the survey, it would still be the property of the plaintiff, and it would be no defence for the defendant to set up, that he took the sand outside of the meanders of the original official survey. This is too plain to require argument. If sea weed be cast upon the sea shore by slow degrees, it belongs, as marine increase, to the riparian proprietor. Angell on Tide Waters, 260; *Emans* v. *Trumbull*, 2 Johns. 322; cited and approved in *Phillips* v. *Rhodes*,

7 Metcalf, 322. Sand or sand-bars connected with the main land, come under the designation of *alluvion*, or *batture*. "Batture is a marine term, and denotes a bottom of sand, &c., rising above the surface of the river." 3 Kent, 519 (top) note a, which refers to and reviews the decisions of the Louisiana courts (where there has been much litigation in reference to alluvion and battures), and where the law has been well, and we think, properly settled. In cases of "islands," especially, the owner ought to be entitled to the *protection* which is afforded by alluvial formations.

If the plaintiff's patent in this case conveys any title to him to the "island," then, by the law, he is entitled to the protection of his grant by the gradual growth and increase. And shall the defendant, a mere intruder, have *legal* liberty to remove the only barrier which preserves the island, and keeps it from being washed or swept away? If, then, the plaintiff in this case is, on other grounds, entitled to recover, the fact that the defendant took the sand *outside of the meanders of the survey*, or from the *batture* or *alluvion* of the island, does not defeat the plaintiff's right of recovery.

2. We shall endeavor to show, that riparian proprietors on the Mississippi river own to low-water mark. We are well aware that in reference to this proposition, there is some conflict of judicial decision; but we trust to be able to show the court, that *both reason* and *authority* are in favor of the proposition, as we have announced it; or, at least, that there is such a conflict, as that this court will be at liberty to make an *independent and sensible* decision of this important question. In *McCulloch* v. *Aten*, 2 Ohio, 307, it is held, that "A boundary, with the meanders of a stream, is the water's edge *at low-water mark*," citing 5 Wheat. 374. In 11 Ohio, 148, it is said that grants on rivers, above tide water, carry the *exclusive* right of the grantee to low-water mark, or, as some of the authorities say, to the centre of the stream." 16 Ohio, 540, teaches the same doctrine. Owners of land on the Ohio go to low-water mark. 4 Blackf. 285; 3 Ib. 194; 5 Wheaton, 374. The case in 2 Porter (Alabama), 436 (cited in 3d Kent, 522, note), repudiates the common law as

to *test* of navigability. 6 Tennessee, 358 (cited in 3 Kent, 523, note), is the same as Alabama and North Carolina. 1 McCord (South Carolina), 580, contains the same doctrine. 2 Devereux (North Carolina), 30, same doctrine; affirmed in 3 Iredell, 285. The Pennsylvania decisions are numerous, and well considered: we cite the following: *Hart* v. *Hill*, 1 Wharton, 131, which holds that "the owner has the right, and sole right, to quarry or take gravel above low-water mark," and this too in a *navigable* stream, although he only *owns* to high-water mark. In *Naylor* v. *Ingersoll*, 7 Barr, 185, it is said that riparian owners on navigable rivers, have the right to extend their wharves to *low-water mark*. In England and this country, the space between high and low-water mark, on a navigable stream, belongs to the owner of the adjacent soil. See *Carson* v. *Blazer*, 2 Binney, 475, as to low-water mark; *Cooper* v. *Smith*, 9 Serg. & Rawle, 32; 14 Ib. 74. Owners adjacent to large rivers, do not own to the centre of the stream. Iowa Legal Inquisitor, March, 1853, 65, containing the recent case of *Frankford* v. *Lennig*. *Handless* v. *Anthony*, 5 Wheat. 375, is a leading case, and urges the reasons in favor of *low*-water mark. We come now to 16 Peters, 261, and 2 Howard, 592, the latter relating to the Mobile case; but after a careful examination of these cases, we find no principle asserted adverse to the plaintiff's right to recover in this case. In Massachusetts, the colonial ordinance of 1641 extended the title of riparian owners to low-water mark, and though the ordinance was limited to Plymouth colony, and afterwards annulled, yet the doctrine of it is held in Massachusetts and Maine to be part of the common law of those states. *Storer* v. *Freeman*, 6 Mass. 438; *Lapish* v. *Bangor Bank*, 8 Greenl. 85; 3 Kent Com.(7th ed.) 522. In *East Haven* v. *Hemingway*, 7 Conn. 186, it is held that the owners of land adjoining a navigable river, have an exclusive right to the soil between high and low-water mark, for the purpose of erecting wharves and stores; but 9 Conn. 38, decides that such owner was not entitled to sea-weed which grew below low-water mark. It is there said, however, that on navigable waters, "the ad-

joining proprietors have the right of the shore, subject to the paramount right of the public. On the death of the owner to high-water mark, his estate on the shore and erections upon it, descend to his heirs." And in 7 Conn. 203, it is said that, "the right of individuals to the use of the soil of the shore, subject to the paramount rights of the public, so far as my information extends, has never until now been disputed." The same doctrine is held in *Nichols* v. *Lewis*, 15 Conn. 143, 2 McLean, 382. In *Bowman* v. *Walthen*, 2 McLean, 382, it is said that, "the common law doctrine can have no applicability to this country, where the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide;" and that, "the riparian right on the Ohio extends to the water, and no supervening right can be maintained or exercised over any part of this space, without the consent of the proprietor." This case was affirmed by the United States Supreme Court, in 1843.

Even if the Mississippi is navigable, the ownership of the soil to low-water mark, is in the proprietor of the adjoining bank, at least as against trespassers. 2 Smith's Leading Cases, 193; citing *Hart* v. *Hill*, 1 Wharton, 124; *Ball* v. *Slack*, 2 Ib. 508; *Freeling* v. *Powell*, 1 Wheat. 528; *Holmes* v. *Richards*, 4 Call, 441; *Mead* v. *Hayes*, 3 Randolph, 33; *Arnold* v. *Lundy*, 1 Halstead, 11; *Asby* v. *R. R. Co.*, 5 Metcalf, 368; *Jones* v. *Jauncey*, 8 Watts & Serg. 436; *Chapman* v. *Kimball*, 9 Conn. 38; 7 Ib. 156; 3 Grattan, 655; *Ingram* v. *Wilkinson*, 4 Pickering, 268; *Bullock* v. *Wilson*, 2 Porter, 448; 4 Har. Dig. 2938; 9 Wend. 571; *Blundell* v. *Catterall*, 5 B. & Adol. 268; *S. C.*, 7 Eng. C. L. 9. We wish to call the attention of the court to another significant fact, in this connection: That there never has been a decision made in the United States, by which the riparian owner has been limited to high-water mark. Some hold that he owns to the centre of the stream; some that he owns to low-water mark; but none that he only goes to high-water mark. Low-water mark is the boundary universally adopted in this country, as the boundary of grants upon lakes. Angell on Water Courses, § 41. Why not apply same rule to rivers?

3. We shall endeavor to show that this island belongs to the plaintiff, by virtue of his patent, and does not belong to the riparian owner on the main shore. The leading case to support the doctrine that islands in the Mississippi belong to the riparian owner, is the case of *Middleton* v. *Pritchard*, 3 Scam. 510. All that part of this decision relating to islands is *dicta*, as the question before the court did not relate to islands. The decision of that particular case is right, perhaps; the *dicta* of the court on the ownership of islands, are *dicta*, not law. We ask particular attention to the "dissenting opinion" of Justice WILSON, and submit to this court that his is the best reasoned opinion. We read it as containing a brief, but lucid, review of the mode of disposition of the public lands by the United States. If the riparian owner (on the main shore) owns Pelican island, he owns it not so much by his patent, as in spite of his patent. His patent only calls for land (a certain quantity) on the main shore; that is what he buys, and that is what he gets. But, say the gentlemen, he also gets, as an incident to his grant, a large island a long distance from the shore. See the objections of Justice WILSON, in 3 Scam. 510, as follows: 1. Want of authority to give grants so extensive an operation; 2. The understanding and intention of the parties in such cases; 3. The constant practice of the United States in selling these islands. In *Child* v. *Starr*, 4 Hill, 382, it is held that, "the soil of a river does not follow as an incident or part of the subject matter, *usque filum aquæ*." "Land cannot be incident or appurtenant to land. The conveyance of one acre can never be made to carry, by any legal construction, another acre, by way of incident or appurtenance to the first," &c. This case was an appeal from 20 Wend. 149 *et seq.* And in 15 Johns. 447, it is said that it is absurd to allow the fee of one piece of land, to pass as appurtenant to another tract. Grants are to be taken most favorable to the sovereign; but in private grants, they are to be taken most strongly against the grantor. This is an important distinction, and which will go far to harmonize many conflicting decisions on riparian rights. *Middleton* v. *Pritchard*, 3 Scam

522; 2 Black. Com. 347; 2 Gill, 227; 6 Peters, 737. Public grants are to be strictly construed, and nothing passes by implication. 11 Peters, 420. *Jackson* v. *Lampire*, 3 Peters, 289; *Beatty* v. *Knowles*, 4 Ib. 163; *Bank* v. *Billings*, 4 Ib. 514; 1 Walk. Chan. (Michigan) 169; 3 Kent Com. (7 ed.) 432. Grants by the public, are to be construed against the grantee. Sir William Scott has vindicated such a construction as founded in wise policy; for such grants are made by a trustee for the public, and no alienation should be presumed not clearly and indisputably expressed. 7 Johns. 8. The government is never presumed to grant the same land twice. 6 Peters, 737. In view of the acts of Congress, there is an implied exception of the bed of a fresh water river beyond low-water mark, in all grants by the government. 2 Porter (Ala.), 436; cited in 3 Smedes & Marshall, 206.

The United States cannot sell a foot of land anywhere, until it has been surveyed and ordered into the market for sale by the proper authorities. No authorities need be cited on this point. Until sold, the title is in the United States. The government is not bound to survey all their lands at once. They may survey half a township, and leave the balance, or they may survey the main shore, and leave all the islands unsurveyed. Suppose Rock island or Credit island had not been surveyed, would they have passed to the riparian proprietor? Will the mere omission of a deputy surveyor, from any cause, to survey an island when he surveys on shore, prejudice the United States? Does his neglect operate to deprive the United States of all islands that he may, by accident or design, omit to survey? See letters from commissioner general land office, and act of Congress, 1839, making special appropriation for the survey of unsurveyed islands. Our positions, in short, are these: 1. That the common law test of navigability or navigableness, does not apply to the Mississippi river. *Bowman* v. *Mather*, 2 McLean, 382; 2 Devereux, 34; 20 Wend. 149; 2 Binney, 475; 1 Walk. Chan. 168; 12 Howard, 454. And if so, then policy, convenience, and good sense dictate, that riparian owners should own, or at least against trespassers, con-

trol, down to low-water mark. "On fresh water rivers, high-water mark should never be the boundary between either states or individuals." 13 Howard, 423.

2. That the Mississippi is a navigable stream. See U. S. Laws, 57, 83, 140; Law of 1783; and so declared by treaties; Constitutions of Illinois and Iowa, and Ordinance of 1787; *People* v. *City St. Louis*, 5 Gill, 368. If navigable, then the fact that it is so, does away, abrogates, abolishes the common law (for at common law it is not navigable), and hence the common law rule of boundary (extending to the middle of the stream), does not hold; and the question comes up for settlement, does the riparian proprietor go to high-water mark? or low-water mark? or to the centre of the current? We say that owners of banks only go to low-water mark. 2 Porter, 448; 3 Black. 194; 4 Har. Dig. 2938; 4 Call, 441; 9 Wend. 571, and cases before cited. These decisions are sustained by acts of Congress. 1 U. S. Laws, 468, § 9; Ib. 491, § 6; Ib. 140, art. 4.

3. We maintain that, if it is not navigable, that then the island in question does not belong to the owner of the shore: 1. Because it is not expressly included in his grant, as will appear by reference to the patent and the plat of the survey, to which the patent in express terms refers. 2. Because in grants by the public, nothing passes by implication, or intendment, or by way of incident, as we have before shown, and as has been repeatedly held by the Supreme Court of the United States.

Suppose that riparian owners, in fact, have no title below high-water mark; does it follow that a trespasser may remove the shore between high and low-water mark, and injure the value of the property, and expose it to being washed away and destroyed? The sand in this case was taken from the upper end of the island, where most needed to protect the island. The defendant claims that he, and the public in common with him, have the right to remove from and around the island, everything below high-water mark. Is it not the inevitable tendency, if not the inevitable effect, of this asserted right, if exercised, to destroy the island, by ex-

posing it to action of the water? If you own a city lot in Muscatine, or Davenport, fronting on the river, has everybody, from A. to Y. inclusive, and "the rest of mankind," an undoubted legal right to remove sand, or gravel, or sink holes, *ad libitum, nolens volens*, up to high-water mark, &c., and thereby lessen its value, expose it to be washed away by the river, and to overflow? Such would appear to be the doctrine of the appellant in this case, extraordinary and unreasonable as it is! What is high-water mark? How difficult to determine in any individual instance, on fresh water streams.

The precise principle involved in this case, has been adjudicated in England. See Woolrych Law of Waters, § 12, from which we quote the following: "To trespass, the defendant pleaded that the close was the sea shore, and that all of the subjects of the king had a right to enter and carry away the sea-weed left by the tide, &c. This was holden to be a bad plea, there being no common law right of that nature." *Stowe* v. *Howell*, 1 Alc. & N. 348; Angell on Tide Waters, 260; *Phillips* v. *Rhoades*, 7 Metcalf, 322; *Emans* v. *Turnbull*, 2 Johns. 322. The analogy of the case cited from Woolrych above, and the one under review, is complete. Both are actions of trespass. One relates to seaweed and the other to sand; both, says Kent, in 2 Johnson, 322, are marine acquests. In the one case, the defendant denies the plaintiff's title, and says the close was the sea shore, and in the other, the same denial is made. In the one case, the defendant pleads that "all of the king's subjects have a right to enter and carry away the sea-weed from the sea shore, left by the tide," &c. In this case, "the defendant claims to have no title to said island, but claims that all persons have the right to take sand from the place aforesaid, and he among the rest."

The case of *Blundell* v. *Catterall*, 5 Barn. & Ald. 208, was trespass for breaking and entering plaintiff's close, viz: the sea shore, between the high and low-water mark of the river Mersey, in Great Crosby, being an arm of the sea. The defendant pleaded: 1. As to the space between high and low-

water mark, a custom on the part of the public to pass on foot and with carriages. 2. A right of bathing in the sea for all the public, and of passing and repassing the shore for that purpose. 3. A right of bathing and passing on foot only. The court gave judgment for plaintiff. BEST, Justice, dissenting. HOLROYD, J., says, at "common law no person, except in case of necessity, has a right to come within or land, or ship goods, out of ports where the shore or land adjoining is private property," and that to do so is a trespass. And in *Naylor* v. *Ingersoll*, 7 Barr, 201, it is said that "In England, and in this country, the space between high and low-water mark, on navigable streams, belongs to the owner of the adjacent soil," citing *Cooper* v. *Smith*, 9 Serg. & Rawle, 32; Baldwin, 72. The case in 7 Barr, shows that the Pennsylvania doctrine does not rest on statute. The leading case of *Blundell* v. *Catterall*, in 5 B. & Ald. 208, is important in this respect, viz: That it decided that the right of bathing was not one of the common law rights, which the public has in the sea, and it defines those rights, but among its enumeration, does not apyear the right to take sand, seaweed or gravel.

The case in 1 McCord (S. C.), 357, is important for us. It lays down this rule: "The public may use the water for the purpose of navigation; but that does not impair the right of the individual to the soil, and the use of the water, as far as is consistent with the right of the public." This is precisely the doctrine for which the appellee contends in this case. If the plaintiff cannot recover in this action, it must be because he has no control beyond high-water mark, and this, then, will be the case with every riparian proprietor. How, then, do you get the power to erect wharves, &c., down to low-water mark? In 13 Howard, 417, it is said: "We must reject the attempt to trace the line by either ordinary low water or low water. These terms are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish water at spring or neap tides." In 13 Howard, 417, this language is used: "Such a difference is uniform twice within every month of the year, and because it is so,

it is termed ordinary." "In that part of a river where there is no ebb and flow, the changes in the currents are irregular, and occasional, without fixed quantity or time of recurrence, except with the wet and dry seasons of the year. And again, in 13 Howard, 423: "The term high water, when applied to the sea, where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case, by winds and storms, and in the other (rivers), by freshets or flood." "But in respect to fresh water rivers, the term is altogether indefinite, and the line marked is uncertain. It has no fixed meaning in the sense of high-water mark, when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of fresh water rivers, by intendment or construction, whether between states or individuals," and then Justice NELSON proceeds to lay down the true boundary line, in case of fresh water rivers. The case of *Wilson* v. *Forbes*, 2 Dev. Law Cases, 34, repudiates the common law test of navigability; and says the "margin of the water is the boundary of the grant at low-water mark." This was the case of a grant of land upon Trent river.

As to the exclusive right of the owner to the sea-weed of the shore, down to low-water mark, see Angell on Tide Waters, 260; *Chipman* v. *Kimball*, 9 Conn. 38; *Emans* v. *Turnbull*, 2 Johns. 313; *Moore* v. *Griffin*, 9 Shepley (Me.) 350; *Phillips* v. *Rhodes*, 7 Metcalf, 322; 7 Conn. 186, and cases cited; 15 Ib. 137. At common law, the public have no right of towing on navigable rivers. This was expressly so decided by Lord KENYON in *Ball* v. *Herbert*, 3 T. R. 253. Angell on Tide Waters, 177. At common law, the public have no right of lading and unlading, on the banks (*ripa*), of a navigable river. Angell on Tide Waters, 178. This was affirmed in the leading cases of *Blundell* v. *Catterall*, 5 B. & Ald. 91. "The *ripa* (banks) of a navigable river, are not *publicii juris*." See also same doctrine in *Ball* v. *Slack*, 2 Wharton, 530, 539. If the law thus protects private rights in this emphatic manner, how can it be contended that the pub-

lic have the right to take sand in front of a man's grant. Judge GRANT attempts to evade the force of the case in reference to sea-weed, in 2 John. 322, by saying that there was something peculiar in that case. This is not so. C. J. KENT expressly says that the plaintiff is entitled "to recover according to the rule of the common law," in such cases. Angell on Tide Waters, 260, recognizes the exclusive right of the owner of land to the sea-weed, at common law; and the note in reference to Lord HALE, read by the gentleman, is not the doctrine of the text. No case *contra* can be found, and Chancellor KENT says, that sea-weed is a marine increment. Is not sand the same?

The case of *Morgan* v. *Reading*, 3 Smedes & Marsh. 366, and the case of *Middleton* v. *Pritchard*, 3 Scam. 510, are the only cases, to our knowledge, in which the common law has been held to apply to the Mississippi river. The case in 3 Sm. & Marsh. was brought by the riparian owner, for use and occupation of his land on the Mississippi river, between high and low-water mark, by the defendant. The defence set up was that the plaintiff only owned to high-water mark. The court decided the defence not a good one, and the plaintiff recovered. The only point before the court was, whether the plaintiff could recover for the use of land by the defendant, between high and low-water mark, and the court decided this, the only question before it, correctly. But the court traveled outside of the case, and seemed to intimate that the common law obtained, and the plaintiff owned *ad filum aquæ*. All this is mere *obiter dicta*, not being before the court. Judge SHARKEY, in his opinion, says, that Pennsylvania is the only state which had not adopted the common law, when, in fact, the common law had been repudiated in the states all around him. It was expressly repudiated in Alabama, 2 Porter, 436; in Tennessee, 6 Tenn. 358; in North Carolina, 2 Dev. (Law) 30, affirmed in 3 Iredell, 285; South Carolina, 1 McCord, 580; besides other states, as cited in our brief before. At the conclusion of the opinion, Judge SHARKEY seems to waver in his opinion, but says the plaintiff is entitled to recover, because he certainly owns to low-

water mark. Under the circumstances, we submit that the dicta in this opinion, are not entitled to much weight.

RECAPITULATION.

We briefly recapitulate our positions as follows:

1. That this is the first time in the judicial history of the country, in which the right of the United States to survey and sell islands in navigable rivers, after the survey and sale of the main land, has been disputed and denied. Yet such has been the almost constant practice of the government. The records of the land office will show, that the United States have always claimed and exercised this right, and that in its surveys, islands in such rivers have, as often as otherwise, been left unsurveyed at the time of the surveys on the shore. Will the mere omission or neglect of a deputy surveyor to survey an island, prejudice the government?

2. That there never has been a decision made in the United States, limiting the riparian owner along our large rivers to high-water mark. The majority of cases hold that he goes to low-water mark, and some to the centre thread of the current; but none, that he only extends to high-water mark.

3. That for the reason given by Sir WILLIAM SCOTT, public grants are to be taken most strongly against the grantee, and "nothing is to be presumed not clearly and indisputably expressed." It is not to be presumed, then (especially in the face of the constant practice of the government to the contrary), that because Pelican island was not surveyed when the main land was, that the government intended that it should belong to the riparian owner, who never intended to buy it, who does not now claim it, and who never paid for it. The island does not belong to the owner of the main shore, because it is not included in his patent. He does not own it by implication, for in public grants, nothing passes by implication or intendment. In 2 Porter, 436, this point was expressly decided—that the United States did not grant below low-water mark.

4. The United States have a perfect right to sell the islands in navigable streams, but not so as to interfere with the easement of the public for purposes of navigation. Such has been the uniform practice of the United States; and they have as much right to sell Pelican island as they had to sell Credit island, or any other. At common law, islands in the sea, *prima facie*, belonged to the king, but "might become vested in the subject by prescription or grant. Hale's *De Jure Maris*, c. 4, 5. This was fully settled in *Sir Henry Constable's Case*, 5 Coke, 105, b; Woolrych on Waters, 49.

5. That the alluvion of banks and islands belong to the owner of the adjoining land. The government sets up no claim to such alluvial formations, and could not sustain it, if they did. 2 Public L. O. & Instruct. 758; Letter Com'r G. L. O. to Hon. J. B. Weller, 31st March, 1840.

6. That the common law as to the navigability of waters, does not apply to such rivers as the Mississippi. Then the common law does not determine the extent and effect of a grant of land upon this river. We cannot say that by the common law such owner goes to the centre, or by that law he is limited to high-water mark, because the common law, not being applicable, has nothing to do with the matter.

7. That if the Mississippi be decided navigable, and the common law effect of grants upon navigable waters applies to it, yet the ownership of the soil, or, at least, as against trespassers, who, like the defendant, disclaim all right, the control of the soil, down to low-water mark, is in the proprietor of the adjoining bank. Woolrych on Waters, 38, and the action of trespass to sea shore, which is decisive of this point. 2 Smith's Leading Cases, 193, and *Hart* v. *Hill*, 1 Wharton, 124, which expressly decides this point as "to sand and gravel;" also 2 McLean, 382, which is conclusive on this point of itself. Justice McLean expressly recognizes the right of riparian owners on the Ohio, below high-water mark.

8. That high-water mark should never be adopted as a boundary in the case of fresh water rivers, by intendment or construction, whether between states or individuals. 18

Howard, 423. The defendant in this case, asks the court to put this construction upon grants by the United States.

9. That grants by the government, on such rivers as the Mississippi, carry the grantor to low-water mark, subject only to the public easement of navigation. This rule at once preserves the value of river fronts, and the rights of riparian owners, and preserves all the rights of the public in the common highways of our great rivers.

10. That the defendant in this case, being a trespasser, and expressly disclaiming all right or title, ought not to be permitted to do acts, the direct and only effect of which are to injure and destroy the land and property of another, and that, too, irreparably, and with impunity.

11. That under the acts of Congress of 11th February, 1805, and others, navigable water courses are the natural and actual boundary lines of grants upon such water courses, and when so platted and returned, they are to be considered the true boundaries, &c., and that in navigable streams, the title to the bed (not the banks) remains in the United States. See 1 Statutes at Large, 268, § 9, and other acts with same provisions.

Preliminary to noticing the two main propositions, which the counsel for the appellant endeavored to maintain, we desire to advert to the extraordinary position which he assumed in the outset of his argument. We state it in his own language, thus: "The ebb and flow of the tide does not constitute the difference at common law between a navigable river and one not navigable." This is a bold, and, to us, a novel position, and one which, with all due deference, we do not think he maintained. In support of it, he cited Woolrych on Waters, 40, and Lord MANSFIELD in Cowper, 87. But see Woolrych, 62, where he recognizes the distinction that the tide is the test of navigability. The most singular circumstance about the matter is, that Mr. Woolrych does not appear to be conscious of innovating upon, or overthrowing, the common law, and he did not intend to lay down any such doctrine as the counsel supposes. See also, Woolrych, citing Lord MANSFIELD, in the case of *Rex* v. *Smith*, 2 Doug.

441, where his lordship holds to the doctrine as generally laid down. There can be no question, that the settled rule of the common law as to navigability of streams, depends on the ebb and flow of the tides. Davies, 152; 4 Burrows, 2162; 12 Mad. 510. The most that the counsel succeeded in doing, was to establish that this, like all other general rules, was subject to some exceptions; and as we do not care much about the question in this case, we will leave the counsel to settle it with Mr. Angell in his work on Tide Waters, 75, 76; Judge HENDERSON (N. C.), in 2 Dev. 34; C. J. TANEY, in 12 Howard, 457; Chancellor KENT, in 3 Cow. (7 ed.) 519; C. J. TILGHMAN, in 2 Binney, 476; and Chancellor WALWORTH, in 17 Wend. 571.

Judge GRANT'S first position was, that the Mississippi river is a navigable stream, and as a corollary, that the plaintiff in this suit only owns to high-water mark. How did the gentleman establish that the Mississippi river is a navigable stream? By citing certain authorities to show that the common law is not applicable to it, and all of which we think contain good law. If the common law applies to the Mississippi, not being a tidal river, it is not navigable. If, as he contended, this river is navigable, then it is so in spite of the common law; or, more correctly speaking, it is navigable, because the common law, not having any applicability to this river, has nothing to do—I repeat it, the common law has nothing to do—with the question as to whether it is navigable or not navigable. Our brother Grant's authorities show this most conclusively, and we are much obliged to him for his kindness in introducing them. He will permit us to thank him for having made out for us, on this point, a stronger argument than we could have made for ourselves. Now let us point out the fallacy of his proposition and reasoning. It is conceded that the common law has nothing to do with the matter. Why does he say that the plaintiff in this case only owns to high-water mark? Because, he says, the owners along navigable waters only go to high-water mark. Where is the proof of this? Where is his authority for this? Why, he refers, to establish this,

the proof of his corrollary, to the same common law which he and his authorities repudiate, and say is not applicable to the Mississippi river. If the common law is not applicable to the river, then none of the effects or consequences of the common law apply to it; one of these effects and consequences being, it is contended, to limit the riparian owner to high-water mark. The fallacy, then, of his argument, is simply this, and it is so obvious, that "he who runs may read" it. In establishing his main proposition, that the river is navigable, he ignores the common law—says it is not applicable to this river—that it has nothing to do with the matter, &c; and yet, when he comes to consider the corollary of his proposition, the same common law, which but a moment before he ignored and declared not applicable, is summoned into requisition to support the corollary, viz: that the riparian owner is limited to high-water mark. It is inconsistent to say that the common law has nothing to do with the Mississippi, and at the same time say that the riparian owner along that river, only goes to high-water mark, because the common law says he owns no further.

WOODWARD, J.(1)—This is the first case which has arisen in the territory, or state, of Iowa, raising the question of riparian rights on the Mississippi river; and the question whether that river is a navigable stream, in the broad sense, or only in a limited one; and whether its shores or bed, or both, belong to individuals, or to the public? The cause might be disposed of briefly, but it calls for a somewhat free and full examination, on account of its interest and importance; on account of the fullness with which it has been presented by counsel, arraying the authorities from all the states upon all sides of the questions involved; and on account of the state of the authorities; in which much has been erroneously taken for granted—a bearing given to pre-

(1) STOCKTON, J., not having heard the argument, took no part in the decision of this cause.

viously decided cases, which they would not warrant—and unsupported inferences drawn from fair decisions.

We are of the opinion that the plaintiff cannot maintain his action. And in expressing our views, we will consider the following three propositions: First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. Second. However the truth may be upon the above proposition, that test is not applicable to the Mississippi river. Third. The common law consequences of navigability, attach to the legal navigability of the Mississippi.

First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. The term navigable embraces within itself, not merely the idea that the waters could be navigated in fact, but also the idea of publicity, so that saying waters were public, was equivalent, in legal sense, to saying they were navigable. Yet the navigability in fact, was the leading idea, and was the ground of their publicity. But on the other hand, there are in England and in this country, many arms of the sea, which, though not navigable in fact, are so legally. It is worthy of attention, that the ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it. The fact that certain rivers were accessible, and could be navigated by vessels of considerable burden, always constituted the substance of the thing. But, as in England, the tide waters, particularly the seas, were by far the most important; and as all of the rivers of that country, navigable in fact, were affected to a greater or less extent, by the tide; and as the high and important admiralty jurisdiction was always governed by this criterion, the ebb and flow of the tide became the usual test. The nature of the admiralty, relating as it did, to the high seas, where the king's authority had sole sway, and to the arms of the sea, gave prominence to the tidal ebb and flow, in legal thought. But there is nothing in nature, or reason, to constitute this

the only criterion. *Blanchard* v. *Porter*, 11 O. 143; 12 How. 454.

In the treatise on the law of waters, by Woolrych, 40 (margin), he divides rivers into public and private. He says: "A public navigable river frequently owes its title to be considered as such, from time immemorial; by reason of its having been an ancient stream; but very many acts of Parliament have been passed, to constitute those navigable rivers, which were not so before. Waters flowing inland, where the public have been used to exercise a free right of passage, from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply, in order to ascertain a common right; others have been attempted, and frequently without success." Thus he negatives the idea that none are navigable but where the tide flows. And then he proceeds to show, that all waters are not navigable (in the legal sense) where the tide does flow; and he cites the case of *The Mayor of Lynn* v. *Turner*, Cowp. 86, in which it was contended, that a river which flows and reflows, and is an arm of the sea, is, *prima facie*, common to all; and therefore "it was urged that an action on the case could not be sustained against the corporation of Lynn, for the non-repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein; consequently, it was said, this non-feasance was punishable by indictment only, because the water must be deemed public. But this argument was treated by the court as a fallacy; for they denied that the flowing or reflowing of the tide constituted a navigable stream; there being many places where the tide flows, which are not navigable; and the place in question might be a creek in the private estate of the corporation." The language of Lord MANSFIELD, in that case, is emphatic: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so."

In *Miles* v. *Rose*, 5 Taunt. 706, GIBBS, C. J., says that the flowing of the tide, though not absolutely inconsistent with

a right of private property in a creek, is strong *prima facie* evidence of its being a public navigable river; and HEATH, J., expresses the same opinion. And in *Rex* v. *Montague*, 4 B. & C., 598, in 1825, BAYLEY, J., says: "The strength of this *prima facie* evidence must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." And HOLROYD and LITTLEDALE, Justices, concur: 10 E. C. L. 414. And Woolrych, again, makes the following conclusion: "The circumstance, therefore, of the flow and reflow of the tide, is one of the strongest in support of a public right; but so far from being conclusive, we have mentioned a case in which such a test has been found to be fallible. Public user, for the purposes of commerce, is, consequently, the most convincing evidence of the existence of a navigable river," &c. It seems clear, then, that even taking the doctrine of the English books, whilst the flow of the tide became, and was spoken of as the usual test, yet it was not this which constituted a stream navigable, nor was it the only test; and that sometimes even this failed. See Hale's *De Jure Maris*, in 6 Cow. 539.

The soil under navigable streams belonged to the king, as *parens patriæ*, for the same reason that the waters did; that is, as a trust for the public use and benefit, although he might grant private rights in either the soil or the waters. This right, however, has not existed since Magna Charta. Woolrych, chap. 1 and 2: Angell on Tide Waters, 19, 67; Hale, *De Jure Maris*, in 6 Cowen, 539; *Chapman* v. *Kimball*, 9 Conn. 38, citing Harg. Law Tracts, 12, 13, 17, 32; Constable's Cases, 5 Rep. 107; *Ball* v. *Herbert*, 3 T. R. 253; Com. Dig. tit. Navigation A. B.; *The King* v. *Smith*, Doug. 441. These authorities are cited by the court in 9 Conn. to support the proposition, that riparian proprietors, bounded on a navigable river, own the soil respectively to high-water

mark, and no further. The plaintiff does not controvert this proposition. He does not claim that the common law rule applies to this river. On the contrary, he claims it does not. And it is necessary for him to thus hold, for if that rule is applied, it carries the riparian proprietor, Cook, *usque filum aquæ;* and this would take the plaintiff's whole island from him. The question of the applicability of that rule, however, lies in our path, and must be determined. It is the main question in the case. But we cannot take the law upon the plaintiff's admission, and therefore must examine it.

Second. However the truth may be upon the first proposition, the flow and reflow of the tide is not applicable to the Mississippi, as a test of its navigability. And third: The common law consequences of navigability, attach to the legal navigability of the Mississippi river. The arguments and authorities upon these two propositions, being in a great measure identical, they must be considered together.

The thought has been before suggested, that as a real and virtual test, the tide is a merely arbitrary one, and is not supported by reason; since many waters where the tide flows are not in fact navigable, and many where it does not flow, are so. It is navigability in fact, which forms the foundation for navigability in law; and from the fact follows the appropriation to public use, and hence its publicity and legal navigability. It is true, that this legality attaches to some waters which do not possess the requisite quality in fact, but this arises from their relation to the high seas, and to admiralty, and from the difficulty of making an hundred exceptions. It is impossible to bring the mind to an approval, when we attempt to apply to the rivers of this country, stretching up to three thousand miles of extent—flowing through or between numerous independent states—and bearing a commerce which competes with that of the oceans—a test which might be applicable to an island not so large as some two of our states; and to streams whose utmost length was less than three hundred miles, and whose outlet and fountain, at the same time, could be within the same state jurisdiction. In England, or in Great Britain, the

chief rivers are the Severn, Thames, Kent, Humber, and Mersey; the latter of which is about fifty, and the first about three hundred miles in length, and of this (the Severn) about one hundred miles consists of the Bristol channel. The world renowned Thames, has the diminutive proportions of two hundred miles. And of even these lengths, not the whole is navigable. Thus, it will be seen, that these chief rivers of good old England, range in extent with our Connecticut, Merrimac, Hudson, Allegany, Monongahela, Cedar, Iowa, and Des-Moines, and bear a proportion of one to twenty, when compared with the greater rivers of this continent.

One of the counsel says he called in vain, in another cause, to learn whether the common law prevails here, and how it came. We will not discuss this question; but it is presumed that some system of law has place here, outside of the statutes, for they assume it. There are but two civilized systems, the civil and the common law. If the civil rules, then are these streams navigable and public, without further discussion. And if we, like the people of these states, generally, have brought the common law with us; then, too, we, like them, have brought such parts of it as are adapted to our institutions and circumstances; and we ask with confidence, whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters, whose flow is through the climates and zones of the earth?

The real test of navigability here, is ascertained by use, or by public act or declaration. We will inquire what these have been in the case of the Mississippi river. By the Spanish treaty of 1795, this river was to remain free to the subjects and citizens of the two powers, and not to others, without special convention. 8 U. S. St. at Large, 140. The act to enable the people of the territory of Orleans, to form a constitution and state government, 20th February, 1811, § 3, provides, that the river Mississippi, and navigable rivers and waters leading into the same, or into the gulf of Mexico, shall be common highways, and forever free, &c. 2 Ib. 642.

The same is again declared in the act admitting the state of Louisiana into the Union, April 8, 1812 (2 Ib. 703); in the act constituting the state of Mississippi, March 1, 1807 (2 Ib. 849); in the act establishing the Missouri territory (2 Ib. 747); and in the act authorizing a convention to constitute the state of Missouri, March 6, 1820 (2 Ib. 546). We then come to the ordinance for the government of the northwest territory (Code of Iowa, 494), and to the acts relating to the survey and sale of the lands (act of May 18, 1796, 1 U. S. St. at Large, 466, 468)—the latter of which declares, that the navigable rivers of the territory shall be and remain public highways; and we arrive at the ordinances establishing the territories, and admitting the states of Illinois, Iowa, Wisconsin, and Minnesota. These are the declarations of the government of the United States. And these several laws, ordinances, and constitutions do, not only with the authority of law, but also with the force of compacts between the United States and the several states, declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible.

The acts of the United States consist in the laws and practice relating to the survey and sale of the public lands. See the above act of May 18, 1796, &c.; also the laws establishing the general land office, and the regulations of that office. By these, it is well known, that the whole bed of navigable rivers is excepted from the surveys; the rivers are meandered, the lines are run, and monuments set upon the margin of the bank. The amount thus made, is computed, and the land sold as of such quantity, and with reference to the plats and field notes of the surveys thus made. By the uniform practice, the islands in the rivers do not pass by grants upon the mainland, but are oftentimes surveyed and sold separately, and subsequently. This was the case with regard to the islands now in question before us.

The plaintiff does not contest the idea that this river is navigable in some sense, but holds that it is not so in the common law sense, or that it is not accompanied by the common law consequences. He claims that the riparian pro-

prietor owns to low water, and that the bed of the river below that, is in the public. The defendant, on the other hand, holds that the proprietor owns to high-water mark only; or, in other words, to the margin of the bank, which is the same thing, in such cases. We shall hereafter have occasion to ask, by what authority or reason, we can, upon rule, throw away both the old lines—the high-water and the *medium filum*—and take the low-water. Some criticism has passed upon the application of the terms "high-water mark and low-water mark," to rivers above the tide. Its perfect correctness is not claimed; but it is sufficiently true, and is more expressive, than any known substitute.

In approaching the cases, it is to be observed, that those states which have no navigable waters other than those where the tide flows, or whose rivers are but small, and their effectual navigability is limited, or nearly so, to the tidal waters, have held more nearly to the usual common law test, and have applied the consequences as inferred at common law; whilst those states which have less relation to the salt waters, or whose rivers are larger, and depend less upon the tide waters for their navigability in fact, have been inclined to depart from the old rule. And those cases which hold tide water to be the criterion, also treat the soil of rivers above the ebb and flow of the tide, as private, notwithstanding it is considered subject to the public right of navigation, when the stream is navigable in fact.

The courts in the states of Maine, New Hampshire, Connecticut, New York, Maryland, Ohio, Illinois and Mississippi, have adopted the common law rule, with more or less directness and fullness. The cases are very fully collected by the counsel, and we have seen and examined nearly all of them. In the most of those from the northeastern states, the subject is discussed very little; but they simply assume the common law rule as the one to decide by, and look no farther. It is conceived that there is no case in the New England states, which requires comment. In New York, the subject has received a good deal of attention in the cases of *Varick* v. *Smith*, 5 Paige, 137; *Same* v. *Same*, 9 Ib. 547;

Ex parte Jennings, 6 Cowen, 537, in a note to which is published a part of L. Hale's Treat. *De Jure Maris; Canal Com.* v. *The People*, 5 Wend. 447; *People* v. *Canal Com.*, 13 Ib. 358; *Canal Appr's* v. *The People*, 17 Ib. 571; *Hewlett* v. *Pearsall*, 20 Ib. 111; *Pearsall* v. *Post*, 22 Ib. 425; *Canal Com.* v. *Kempshall*, 26 Ib. 404; *Gould* v. *Hudson R. R. R. Co.*, 2 Seld. 522.

The cases in Pennsylvania, have been cited in the books, on both sides of this question; but it is conceived that there has been a misapprehension of them, in citing them in favor of the old rule. Thus, the American editors of Smith's Leading Cases, in their note to 2d vol. 193, say, that "so far as the tide ebbs and flows, the ownership of the soil to low-water mark, is in the proprietor of the adjoining bank," and cite several Pennsylvania cases, among which are *Hart* v. *Hill*, 1 Whart. 124; and *Ball* v. *Slack*, 2 Ib. 508. In that state, the courts have recognized the right of several fisheries, as arising from ancient custom and from statute; but they have held no doctrine of a right to low water, any farther than as relating to and connected with, such fishing. Thus *Hart* v. *Hill* was for a direct interruption of the right of a several fishery, and the court say, "and first, a fishery is in the river, and is not the space between high and low water, though the use of that space may be necessary in the use of it, and may be included in the term fishery." It is true that they use general language, which implies more than this, but it is to be taken in reference to the case before them.

In *Ball* v. *Slack*, 2 Whart. 508, the reporter's abstract says: "It seems that the owners on the Delaware and Schuylkill, have a right to the land between high and low water, subject," &c. It may be doubted whether even this, is warranted by the opinion, but admitting that it is, the law there is distinctly settled to the contrary, in *Carson* v. *Blazer*, 2 Binn. 475, and in *Shunk* v. *Schuyl. Nav. Co.*, 14 S. & R. 71. Many inaccurate expressions have been used in the cases in that state, relating to fisheries, which have led to confusion, but the subject is much cleared in the two cases above

cited. And both Pennsylvania and Connecticut recognize a right, either from statutes or local common law, to build wharves, &c., for commercial purposes. The case of *Chapman* v. *Kimball*, 9 Conn. 38, announces the rule to be, that owners on navigable rivers own to high-water mark. They say: "The usage of the owners of land to high-water mark, to wharf out against their own land, has never been disputed. This is our common law." Time will not permit the examination of the remainder of the cases cited in the above note, but it is conceived, with deference, that they do not show such a rule to be established—at least outside of their own state.

The case of *Mullanphy* v. *Daggett*, 4 Mo. 343, is not to be cited in this class, for it stands upon the express ground, that the Spanish government granted to the water. And *Browne* v. *Kennedy*, 5 Har. & John. 195, is hardly to be ranked here, for the basis of it is the king's grant to the lord-proprietor; which the court considered as carrying the right to the shore, and which the proprietor afterward granted away. In the above cases, from the most of the foregoing states, the consideration arising from the common law rule, and those connected with it, to which we have before alluded, seem to have carried the minds of the courts, as of course, for there was nothing in their circumstances to awaken the question of the applicability of the old rule. And, besides, the earlier of them set the rule down, before the development of the western country had shown the vast public importance of our greater rivers, as amounting to inland seas. It is also worthy of attention, that these same cases hold, that the rule does not extend to larger bodies of fresh and standing waters, namely, the lakes which are within the limits of New Hampshire. They carry the adjacent owner's right to the water, but not *ad medium*. See *The State* v. *Gilmanton*, 9 N. H. 463; *Canal Comrs.* v. *The People*, 5 Wend. 447; and Hale's Treat. in 6 Cow. 545, is cited.

But when we approach those states which, while they border upon the great western rivers, have still been held

more or less by the common law rule, we are compelled to give very considerate attention. This has been the case with Ohio. The case of *Blanchard* v. *Collins et al.*, 11 Ohio, 138 (old series), in 1841, if regarded as one of the first settling this question, is certainly not a fully considered one. The common law rule is at once recognized. There is not a word in relation to the character of that river, the Ohio—nothing in relation to the ordinance of 1787, and its meaning and effect—and nothing concerning the laws and practice in respect to the survey and sale of the public lands. It stands chiefly on the two cases in New York. *The People* v. *Platt*, 17 Johns. 195, and *Hooker* v. *Cummings*, 20 Ib. 90; and its own case, *Gavitt* v. *Chambers*, 1-4, Ohio, 643. It also relies, partly, upon the cases of *Cooper* v. *Smith*, 9 S. & R. 26, and *Shunk* v. *Schuylkill Nav. Co.*, 14 Ib. 74, which it claims to teach, that the riparian proprietor owns to the water, but not *ad medium filum;* and thus neither following the common law, nor wholly abrogating it. We conceive that the court gave these two cases a meaning which they do not inculcate. They will be examined hereafter.

All the cases in Ohio may be influenced by the consideration, that by the cession of Virginia to the United States, by the compact of 1792, between that state and Kentucky, the latter owns the river to the water's edge on the Ohio side, and Ohio owns the soil down to the water, but no part of the water, although she has a concurrent civil jurisdiction with Kentucky. *Handley's Lessee* v. *Anthony*, 5 Wheat. 374. In this case—*Blanchard* v. *Porter*—the court considers the Ohio a navigable river, but not in the technical sense; and say, that "grants of land bounded on rivers, or upon the margins of the same, above tide water, carry the exclusive right of the grantee to low-water mark; or as some of the authorities say, to the centre of the stream. None of our rivers in the western country, are navigable in the technical acceptation of the term. They fall within the second class. The distinction was originally made, in order to define the jurisdiction of the admiralty courts." Here we find

it recognized, that the admiralty had much to do with the creation of the old rule; and what is the inference, when we learn that *our* admiralty jurisdiction extends over these very rivers. *Propeller Genesee Chief* v. *Fitzhugh*, 12 How: 443, 454.

The case of *Walker & Fulton* v. *Board of Public Works*, 16 Ohio, 540 (old series), in 1847, is one of mandamus, under a statute, to inquire into the right to damages of proprietors on rivers, in which the state had authorized improvements. It related to the Great Miami, which had been declared navigable by statute. The court held justly, that such statutory declaration, could not take away the prior rights of riparian owners. They touch very briefly these rights "in the streams within our borders, which are in fact navigable," and say, that the question is not new in that state, having been repeatedly before that court, and that the rule is, that the riparian proprietor owns to the centre, or the "entire river," if he owns land on both banks. This manifestly is restricted to the streams strictly within their borders. Otherwise, it contradicts the other decisions. And this leaves out the Ohio and the Wabash. *Stinson* v. *Butler*, 4 Black. 285, considers the English rule as to high-water mark, as applicable to waters which ebb and flow, and curtly holds, that grants by the United States of lands on the Indiana side of the Ohio, extend to low water, and seems to infer it from the fact that the state boundary goes there; and this is the only reason intimated. If the state boundary had gone to the centre, would the grant have reached it? If this is the argument, it conflicts with almost all on the same side of the general question.

The case of *Middleton* v. *Pritchard*, 3 Scam. 510, goes further, and is one of the strongest of the western cases. It was trespass for cutting trees. The plaintiff bought of the United States the fractional southeast quarter of S. 13, T. 5, N. R. 10, W., of 3 P. M., in Illinois, containing 32.74 acres. In front of it, in the river, within his lines if extended, is an island, probably containing nearly the same quantity, separated from the main land by a slough or bayou, which was

covered by water only a smaller part of the year, and the remainder of the time is uncovered, and grass grows there. There is a distinct bank and shore on the margin of this fractional section, and the survey was along the bank, the island not having been surveyed. The court held, that the plaintiff, by his purchase, took the island, but it is not clear whether they considered him as going to low water only, or to the middle of the river. The dissenting opinion of WILSON, C. J., rather indicates the latter, and there is no reasoning which negatives it, whilst the reasoning upon the common law rule, if carried out, would take the plaintiff to the centre. There are two points, upon which the court departs from the mass of cases; first, it applies to the grant of the government, the rule of private grantors, namely, that the grant is to be taken most strongly against the grantor; and then assuming that it is a grant, bounded by the river, they apply the other rule, that it extends to the centre, unless expressly negatived. Second: it rejects the surveys, field notes, &c., as constituting any part of the description or limitation, and say these are only for computation, and to arrive at the price. Now, we conceive, that the rule of a grant being construed most strongly against the grantor, does not apply to public grants; but that the government, being but a trustee for the public, its grants are to be construed strictly. *Varick* v. *Smith*, 9 Paige, 547; *Canal Comm'rs* v. *People*, 5 Wend. 444, 460, 464; *Same* v. *Same*, 17 Wend. 574, note, 612; *La Plaisance Bay* v. *Monroe*, Watkins' Ch. 155; *Charles R. Bridge* v. *Warren*, 11 Pet. 544; *Stonebridge Canal* v. *Wheeley*, 2 Barn. & Add. 792. And we had supposed that the grants of land by the United States, in their patents, had relation to the surveys, plats, and field notes. *Jackson* v. *Freer*, 17 Johns. 28; *La Plaisance Bay* v. *Monroe*, Walk. Ch. 155; *Chinoweth* v. *Les. of Haskell*, 3 Pet. 96; *McIver* v. *Walker*, 4 Wheat. 447; *Pearsall* v. *Post*, 20 Wend. 116; *Rowan's Ex'rs* v. *Portland*, 8 B. Mon. 232; 17 M. 207; 9 Watts, 117; 2 Cart. 278; 7 Johns. 222.

But the chief justice, WILSON, differed from the conclu-

sion of the majority of the court in the above case. He dissented from the application of the above rule to public grants; and we think his opinion more harmonious in its course of thought, with the train of legal reasoning generally. It would be gratifying to quote a larger portion of his remarks, but a few brief passages must suffice. He objects a want of authority in the agents of the government to sell, thus: "The land authorized to be sold," he says, "and the mode of selling it, are prescribed by law, and all sales in violation of that are void." "These surveys and plats are the guides of the land officers in making their sales; they have no authority to sell a single acre that has not been surveyed. Every tract of land liable to sale, is specifically described," &c. "It follows, therefore, as a necessary consequence, that islands, as well as other lands, that have not been surveyed and platted as the law requires, cannot be sold. It has no description known to the law." And he argues that neither the government nor purchasers, understand or intend that islands pass by a sale of lands on the nearest shore.

Morgan & Harrisson v. *Reading*, 3 Sm. & M. 366–395, in 1844. This case was very completely argued, and we cannot say but that it was deliberately considered. It takes the English rule as the test, and applies it in the legitimate, logical consequences, and gives the riparian proprietor *ad medium filum aquæ* of the Mississippi river.

If we were called upon to illustrate the impropriety of applying the English rule to this and other great rivers, we would cite the above case from Mississippi, and that of *Mullanphy* v. *Daggett*, 4 Mo. 343.

It is impossible to define beforehand, all the fair uses to which the navigators of these public rivers may have occasion to appropriate their shores. But let us take these two cases as examples. The above case from Mississippi shows, that the plaintiff was the owner of a certain lot in the city of Vicksburg, which lot the court held to extend to the middle of the river. The defendants were "citizens of Ohio, and regular flat boat traders." They landed their boat op-

posite the city, at the shore, and opposite the plaintiff's lot, and used the shore to tie the boat to, and land their goods upon. They remained there some time, and plaintiff charged them a rent of one dollar a day, which they refused to pay. The court held them liable. Now, is not this repulsive to all our ideas of the objects, uses, and appropriations of this great river? If it is said that they remained a long time (four months), let it be remembered that this is not the point of the case, and that it does not change the argument. If there is any weight in that fact, the answer is, that the landing should be placed under the authority of the city, and let that regulate such matters, and then the matter would fall under a different train of reasoning. The case of *Mullanphy* v. *Daggett*, 4 Mo. 343, was decided upon the Spanish laws and the king's special grant. But let us look at it in the light of that of *Morgan et al* v. *Reading*. The defendants hauled up their steamboat, for repairs, on the shore of the river. They remained there some six weeks, and erected a temporary blacksmith's shop, for the purposes of their work. What can be conceived of, as a more legitimate use of the shore of a great navigable river? It is said that they might go to some town or city, which has docks or ways, or other facilities for such purposes. Suppose the accident to occur far from such a place, and the operation to be impracticable, and then how many such places are there on our waters? The very question is, are they *compelled* to do so? Such arguments assume the practicableness of such a course; they take for granted the practical convenience—a matter which is generally desirable in such cases, for convenience and interest commonly lead to that course, when practicable. Are these rivers public and free to run your boat or vessel, and not public and free to stop when you are disabled? A restricted construction of the rights of navigation in these waters, reducing them to a petty sufferance, is greatly to be deprecated.

Before coming to the case where the common law rule is set aside directly, it seems desirable to look a little more closely at two or three of those in which the old rule is

adhered to, for in them we can readily perceive, that the adoption of the former rule was for a time doubtful; that it is to a limited extent only, that it is followed; and that the same courts would have probably decided differently, had they been adjudicating upon our rivers.

It is important to remember, that in very few of the cases in the northeastern states, has the question been opened up at all considerably; but in nearly all of the older ones, the wheels run into the old ruts, as a matter of course, rather than from a deliberate choice of ways, in the same manner that they generally do, unless something arises to start the attention anew. They first drew a line of distinction between streams and standing water, and refused the application to lakes or other large bodies of like waters, thus making a criterion about as important, in view of the real nature of the case, as the ebb and flow of the tide, or the saltness of the water. Thus, in New Hampshire and New York, the rule was withheld from the small lakes in their interiors, as well as from the larger ones on their borders. But, however it may have begun, the rule having been settled, and rights of property having grown up under it, and there being in this case, no strong reason for a change, it still and very properly remains. In *The Canal Commissioners* v. *The People*, 5 Wend. 423, Chancellor WALWORTH says: "The principle itself does not appear to be sufficiently broad to embrace our large fresh water lakes or inland seas, which are wholly unprovided for by the common law of England." "It is not necessary to express an opinion," he says, "whether this principle can be properly applied to some part of those streams which are navigable from the sea, by large ships and vessels, far above the influence of the tides, as that question can never arise in this state. We have no such rivers." Surely, such an expression leaves us, who have such rivers, free to discuss the question anew, and without feeling constrained by those decisions. Again, he says: "The rivers in England above tide, in point of fact, are not navigable, except for small craft; reasons, therefore, exist in that island, for the common law rule, which have

no existence in this country. It is contrary to fact, to assert that our immense fresh water rivers are not navigable; and it is matter of just exultation, as well as benefit, to the country, that in the United States we have rivers which above tide, are navigable to a greater extent than would be the circumnavigation of the United Kingdom of Great Britain and Ireland. It is therefore preposterous to contend, that the limited doctrines of the common law are applicable to the Mississippi, Ohio, Susquehanna, Niagara, and St. Lawrence. If applicable, the owners of land on these streams have a right to go to the centre of the rivers, and Grand Island, in the Niagara, with 18,000 acres, would belong to the owners of the shore."

The same case was again before the Court of Errors, under the name of *The Canal Appraisers* v. *The People*, 17 Wend. 571. In an abstract of the conclusions to which the senators delivering opinions arrived, Chancellor WALWORTH's sixth proposition, is, that it is conceded that the common law rule does not apply to large navigable lakes, nor to rivers constituting the boundaries between that and other states. The third proposition of Senator BEARDSLEY, is that the common law rule, which authorizes the owners of the shores of rivers in which the tide does not ebb and flow, to hold *ad filum aquæ*, is not applicable to the condition of that state (New York), in respect to its large navigable rivers, in which no tide ebbs or flows; that from the acts of the government of New York, as well before as since the Revolution, in asserting the title of the public to islands and the beds of rivers, after granting the lands upon the shores of navigable rivers in which the tide does not ebb or flow, a strong presumption is raised that the common law, in this respect, has never been adopted there. The first proposition of Senator TRACY (president of the Senate), is, that the great fresh water streams of this country are not subject to the principle of individual appropriation, allowed by the common law of England; and his third is, that the reason of the rule, assigning the proprietorship of the bed of a river to the owners of the adjacent shores, wholly fails in refer-

ence to the large navigable rivers of this country. And fourth, that the long continued practice of granting islands in rivers, subsequent to patents covering the adjacent shores, contradicts the assumed application of the common law rule of riparian ownership, as applied to the great rivers of that state. The chancellor, who is in favor of applying the common law rule as far as practicable, says, in his opinion: "Considered in this light, is there any possible objection to the common law rule, even in regard to our largest rivers, which are wholly within this state, and above tide water? A different rule must probably prevail as to our large navigable lakes, which are mere inland seas, although there is neither ebb nor reflux of the tide; and also as to those lakes and streams which form the natural boundaries between us and a foreign nation." In this case, the surveyor-general of the state gave testimony, and in reference to it, and in allusion to the description in the grant, the chancellor makes a remark pertinent to the present surveys and sales. He says, the patent itself contains only the number of the lot, but that the survey and field notes in his office, contain a particular description of the boundaries; that where such lots are situated on the banks of navigable rivers, they are bounded on the banks of such rivers or streams, and run thence along the bank of such stream. This is a clear indication of the intention of the grantors, that the patent should not include any part of the *alveus* (or bed) of the stream, or of the islands therein. It is therefore a limited grant, and it cannot be extended to the thread of the stream, nor include any island therein, even on common law principles, especially when we take into consideration, that by a law of the state, the patentee was entitled to only a certain number of acres." Senator BEARDSLEY also, in his opinion, comments on the practice of the state in granting the islands separately from the main land, although the grants were in the terms bounded on the bank, and thence down along said river," which at common law would have extended the grants to the thread of the stream; and considers this as an evidence that the common law rule of fresh water rivers, had not been

regarded as applying to the Mohawk, the river under consideration. On page 616, he says: "Here allow me to inquire, what good reason can be urged in favor of applying these principles to our large American rivers, and thus keeping up a distinction in name, where in reason and good sense, none should exist. Why, for instance, should proprietors of land on the Mississippi, where the tide ebbs and flows, be restricted to the bank of the river, and that part only be called navigable; and those proprietors of lands immediately above the flow of the tide, be suffered to go to the centre of the stream, when the river in point of fact, is actually navigable for thousands of miles above tide-water. Yet such are the absurdities of the common law, when applied to our large rivers. In England, this rule is very proper in reference to small rivers, and is calculated to prevent litigation, &c. But in respect to our large rivers, there does not appear to be any propriety in the rule; and if in England and in this country, it is essential to the public interest, to declare that arms of the sea, bays and rivers where the tide flows, belong to the state or nation, it is equally important that the same rule should prevail in respect to our large rivers, where the tide does not flow." In the same case, *Canal Appraisers* v. *People*, ~~19 Wend. 621~~, President TRACY says: "It is impossible for me to believe it reasonable or right, that the great fresh water streams of this country ever were or should be subject to those narrow principles of individual appropriation, which might fitly enough apply to the comparatively insignificant water courses which are found in England; and even in that part of the European continent where the civil law originated." "It is utterly incredible that when they (the colonists) surveyed the magnificent rivers, which a bountiful providence has provided, they could imagine that gifts, which from their very nature and extent were capable, not only of being enjoyed by all, but of supplying the wants of all, should by a misapplication of a principle utterly unsuited to the subject to which it was applied, be made the exclusive property of a few; in short, that because the common law had assigned the ownership of

a petty streamlet in England to its riparian proprietors, therefore, unlooked for by themselves, the first settlers on the banks of the magnificent rivers of this country, had acquired an exclusive right to the broad channels through which those rivers flowed." He then adverts to the practice of the state in granting islands separately from, and subsequently to, the grant of the main land, as negativing the idea that the bed is private, and concludes thus: "Ought we, then, in the face of this long continued practice, and unconstrained by any direct authority, either legislative or judicial, to close our eyes to the condition of things which surround us—the expanse of this continent—the copiousness of its waters—the improvements, intelligence and wants of this age? On such a subject as this, even admitting the facts to be obscure or equivocal, and the law to be unsettled, is it wise for us to disregard the dictates of enlightened reason, the suggestions of public policy, and the irresistible progression of liberal principles, resulting from the physical and intellectual advancement of mankind; and turning backward, to resort to the circumscribed views of a less enlightened age, for a narrow, insular, and inadequate rule, by which to measure the flow of our jurisprudence?"

Had these jurists been hearing the cause at bar, they could not have expressed sentiments more pertinent. Their thoughts we adopt, and make them our own, and we quote them freely, rather than merely express the views as of ourselves, that it may be seen that other judges, in other parts, and of more learning and ability, have entertained them, and therefore they are not novelties; and also that it may appear that the old common law rule has but a weak hold on the country, and is by no means dominant, but that all things combine for the rejection of its confining influence.

In accordance with this general and strong tendency, several states have refused to apply the narrow rule to their large waters. As early as 1810, the Supreme Court of Pennsylvania, in the case of *Carson* v. *Blazer*, 2 Binn. 475; took the lead. The case came up upon exceptions taken to a charge to a jury by Chief Justice TILGHMAN, concerning

a right of fishing. He said: "The several acts of assembly declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the common law right. But the common law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehannah, which is a mile wide, and runs several hundred miles, through a rich country, and which is navigable, and is actually navigated by large boats. If such a river had existed in England, no such law would have ever been applied to it. Their streams, in which the tide does not ebb and flow, are small." It appears from the opinion of BRACKENRIDGE, J., that the grants sometimes extended to the water, and called for it, and even where they did so, they were held not to go to the middle of the stream; nor did they go *to* the water, unless the grant was explicit.

This case was followed by *Shunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 71, in 1826; *Bird* v. *Smith*, 8 Watts, 434; *Union Canal Co.* v. *Landis*, 9 Watts, 228, in 1840; all of which recognize the same doctrine. There does not seem to have been advanced in Pennsylvania, a claim to the centre of these large rivers, nor even to the shore. Two of the above cases, arise on claims to the exclusive right to fish with seines in the pools made or kept in order by individuals, founded upon a supposed ancient usage. But the claim of such a right was rejected.

North Carolina, also, in 1828, set aside the common law rule, as inapplicable. And the only thing which gives the riparian owner, in that state, a right down to the water, is the express declaration of their ancient acts of 1715 (or 1765) and 1777, relating to surveys and sales; and their otherwise total exemption from the common law private rights, stands upon the ground that they are declared to be highways, as the acts and laws of the United States have declared other rivers. Tennessee follows the decision in North Carolina, as subject to the same acts of assembly.

In the case of *Cates* v. *Wadlington*, 1 McCord, 583 (356 top), in 1822, the Supreme Court of South Carolina, by NOTT, J., says, "But that rule (the common law) will not do

in this state, where our rivers are navigable several hundred miles above the flowing of the tide." And they say this in close connection with the assertion, that there is no legislative act declaring which, or whether any, of their rivers are to be considered as public or navigable, so that the subject was free from any kind of constraint, except the common law rule.

The subject received more elaborate attention in *The Mayor, &c., of Mobile* v. *Eslava*, 9 Porter, 578, in 1840, than in nearly any of the other causes; and it is here viewed with more reference to the ordinances and laws of the United States, which are scarcely alluded to in any one of the foregoing cases, but without which, we conceive it impossible to reach the merits of the question. The common law rule alone seems to have absorbed the attention, in the consideration of the cases, whilst the treaties, ordinances and laws of the United States, have been overlooked or passed by in silence.

The United States provided that the navigable waters within the state of Alabama, should forever remain public highways, free to the citizens of said state and of the United States, &c., in like manner as in the ordinances relating to all the other new states. The court, in the above cause, arrive at the following conclusions:

1. The navigable waters within the state have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same.

2. The navigable waters extend not only to low water, but embrace all the soil that is within the limits of high-water mark.

3. By the acts of Congress regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters and the soil covered by them.

4. That, as the original states are entitled to the right of property in the navigable waters within their territory, so Alabama, being admitted into the Union on an equal foot-

ing with the original states, is, of consequence, entitled to the same property in her navigable waters, and the soil under them.

5. By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the right of the United States, except so far as it was reserved by the federal constitution, in some of its grants, or its retention was necessary to enable the federal government to exercise its delegate powers.

In the opinion of the court, they hold the following language: "The several acts of Congress regulating the survey of the public lands, all provide for the surveys which border on navigable streams, to be so made as not to include within their lines any part of the shore. 1st Vol. Land Laws (ed. 1838) 50, 96, 104, 191." And again; "We find it is also enacted, in the territorial ordinance, and the laws regulating the survey and sale of lands in Mississippi and Alabama, that the navigable waters shall be and remain public highways. Here were express avowals by Congress, that they should not be surveyed and sold, but should be withdrawn from commerce." "It is then considered clear, that the navigable waters of this state have been dedicated to the common use of the people of the United States; but perhaps it may be considered as questionable, what extent of soil is embraced by the dedication. We think it must be so much ground as is covered with the water, not only at low, but at high tide. The government surveys extend thus far, and the shore is regarded rather as a part of the water, than as land. It is believed that there is no instance in which the United States, after having sold the land to high water, has afterwards asserted a right to dispose of the space between that and low-water mark." The land in question in the above cause, is adjacent to the city of Mobile, in the Mobile river. That the tide flows there, we infer, but this fact is barely alluded to incidentally. It does not form the ground for any of the reasoning of the court, nor the turning point for any of its conclusions. The whole case, with all the views of the court, is as appropriate to the Mississippi

river, along the borders of Iowa, as to the Mobile in Alabama. Here alone, and for the first time, has the proper force been given to the repeated dedications of navigable waters to the public of the United States. And it seems utterly inconsistent with these acts of dedication, and with the laws, to give the public only a qualified, partial, restricted use—a mere easement over the waters. See 16 Pet. 235–247; *Polland's Lessee* v. *Files*, 2 How. 592.

The case of *La Plaisance Bay Harbor Co.* v. *City of Monroe, in Michigan*, Walker's Ch. 155–168, in 1843, holds the same doctrine. The language of the court is: "The complainants do not own either the bed or the banks of the river below the point of obstruction. The bed of the stream is public property, and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey; and the common law doctrine of *usque ad filum aquæ*, is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement, or right of way only. So with regard to our large lakes, or such parts of them, as lie within the limits of the state."

Probably all of the cases from the state courts upon this subject, have been referred to by the counsel, whose industry has opened the cause to a free examination; and all of a leading character, so far as we have been able to obtain them, have been examined. It is now necessary to see how far the matter has been discussed or settled by the federal courts.

Tyler v. *Wilkinson*, 4 Mason, 397–400, related to the Pawtucket river, a small river flowing in part of its course between Massachusetts and Rhode Island; but the controversy was between individuals. Judge STORY, without any discussion, assumes the application of the common law rule to that part of it which was above the tide water.

Bowman's Devisees and Burnly v. *Wathen et al.*, 2 McLean, 376, is cited on both sides of the question, but we think it a strong authority against the application of the common law rule. Judge MCLEAN says: "We apprehend that the

common law doctrine as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does in no respect depend upon the ebb or flow of the tide. On navigable streams, the riparian right, we suppose, cannot generally extend beyond high-water mark." The doubt as to the application of this case, as an authority, arises on the next passage, in which he says, "But in the present case, this inquiry is not important. It is enough to know that the riparian right on the Ohio river extends to the water," and that "the proprietor has the right of fishing, of ferry, and every other right which is properly appurtenant to the soil." The doubt is, whether the learned judge means this latter as a proposition holding true of the Ohio generally, or of grants standing, as the one before him did. He may have intended it of the Ohio generally, upon the strength of the cases before cited from that state; but strong against this construction, is the assertion that the proprietor has the right of fishing! Now, no one has ever gone so far as to claim a several fishery in that, or any other of the great western rivers; and the Ohio cases, as well as *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, negative such a right; for they hold that as the state of Ohio extends to low-water mark only, of consequence no grant by, or in, the state, can extend farther; and the right of a several fishery implies, *ex necessitate*, a title or right *usque filum aquæ*. There is a view which renders Judge McLean's remarks entirely harmonious; that is, considering his last remark as made in reference to the right or title before him. For, directly, in connection with the foregoing thought, he proceeds thus: "In coming to this conclusion, we have deemed it unnecessary to look particularly into the laws of Virginia, under which the title in question was derived," &c. "The title of Isaac Bowman (one of the complainants) was derived from the state of Virginia, not only before Indiana was known as a territory, but before the organization of the Northwestern Territory. His rights, whatever they were, can have been in no respect affected by the direct act of the territorial government, or of the state government which

succeeded it." On page 377, in the statement of facts, is the following, which forms the basis of the case. The complainants claim under Isaac Bowman. "Bowman was attached to the regiment commanded by George Rogers Clark, and to whom the state of Virginia granted 150,000 acres of land, lying northwest of the river Ohio. In the cession of lands to the United States, north of the Ohio river, by the state of Virginia, this tract was reserved." Now it is difficult to apply Justice McLEAN's remarks to aught but this title and this state of things; and so viewing it, the case remains as one against the application of the common law rule even to the Ohio river. And if it is not to be so regarded, the case is still one against such application to any other of the great streams. The case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 376, teaches nothing on the question before us. It was ejectment in the federal court in Kentucky, for land claimed by the plaintiff under a grant from the state of Kentucky, and which the defendant claimed under a grant from the United States, as being a part of Indiana. It was a piece of land near or on the Indiana shore, which was an island when the water was at a full or middling flow, but was left connected with the Indiana shore at low water. Chief Justice MARSHALL said: "The title depends upon the question whether the lands lie in the state of Kentucky, or in the state of Indiana," and the court held, that the state of Kentucky extended to low-water mark only, on the western or northwestern side of the Ohio. This was by virtue of the cession from Virginia to the United States.

The cases of *The City of Cincinnati* v. *White*, 6 Pet. 432; *Barclay* v. *Howell's Lessee*, 6 Pet. 499; *The City of New Orleans* v. *United States*, 10 Pet. 662, which have been cited, afford us no specific assistance. But time will not permit us to examine them.

The case of *Pollard's Lessee* v. *Hagan*, 3 How. 213, however, does contribute to our views, in that it holds that, "the shores of navigable waters, and the soils under them, were not granted by the constitution of the United States, but were reserved to the states respectively; and the new states

have the same rights, sovereignty and jurisdiction over this subject, as the original states." And McKinley, J., in delivering the opinion of the court, says, page 229: "Then to Alabama belong the navigable waters and the soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States." And again, page 230: "To give to the United States the right to transfer to a citizen, the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon, which might be wielded greatly to the injury of state sovereignty, and deprive the state of the power to exercise a numerous and important class of police powers." The above cause is re-examined and affirmed in *Goodtitle* v. *Kibbe*, 9 How. 471, where it is again held, that the title to the soil below high-water mark, in navigable waters, is in the state.

The case of *Howard* v. *Ingersoll et al.*, 13 How. 381, does not bear upon the present question. The plaintiff's land had "for its eastern boundary the state of Georgia," as the bill of exceptions reads. And Wayne, J., in the opinion, says, "The point for decision is one of boundary between the states of Georgia and Alabama." It related to the river Chattahoochee, which is believed not to be navigable in any sense in that part. At least, the question of its navigability does not enter into the case at all.

We desire to add a passage from the opinion of Chief Justice Taney, in the case of the *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, in 1851, in which case was considered the question of the extension of the admiralty jurisdiction of the United States to navigable waters, other than the tide waters. "Now there is nothing," he says, "in the ebb and flow of the tide, that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide, that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same; and if a distinction is made on that account, it is merely arbitrary, without any foundation in rea-

son; and, indeed, would seem to be inconsistent with it. In England, the writers and courts always speak of the jurisdiction as confined to tide water. And this definition, in England, was a sound and reasonable one, because there was no navigable stream in the country, beyond the ebb and flow of the tide, nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water, are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. At the time of the adoption of our constitution, the English definition was equally proper here. In the old thirteen states, the far greater part of the navigable waters are tide waters, &c. * * * * The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. They measured it by tide water. And that definition, having found its way into our courts, became, after a time, a familiar mode of describing a public river, and was repeated as cases occurred, without particularly examining whether it was as universally applicable in this country as in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably, here as well as in England, tide water must be the limit of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings, and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it were limited by the tide. The description of a public navigable river, was substituted in place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition, originally correct, was adhered to and

acted on, after it had ceased, from a change of circumstances, to be the true description of public waters."

This large portion of attention has been given to the subject, from a conviction that the common law rule is not applicable to the Mississippi river; and because the subject has not been discussed as it should be; the courts assuming the old rule, in many cases, *sub silentio*. By thus reviewing it, we trust that it has been made manifest that less weight is to be given to the old rule, than the mind would, at first, suppose, and that the way has been opening for its entire rejection from the noble waters of the west. It cannot be doubted, that by the common law, the riparian proprietor on navigable waters owned to high-water mark only. 2 Woolrych on W., 40–44; Angell on T. W., 22–24; *Chapman* v. *Kimball*, 9 Conn. 40, and authorities cited on 38.

What, now, is to carry us down to low water? The plaintiff himself holds, that the common law rule is not applicable in its whole extent. And well he does so, for it would take away his island. But why shall we go to low water? Is this common law? and if it is not, what law is it? It is apprehended that there is no such rule or principle, and that the instances where such a rule was adopted, were dependent on certain local circumstances. *Chapman* v. *Kimball*, 9 Conn. 38, stands upon a local common law or usage. The court announces the rule to be, that owners on navigable rivers own to high water, and no further; and that their local common law gave a right to build wharves, &c. In North Carolina and Tennessee, the statute makes this the line. *Blanchard* v. *Collins*, 11 O. 138, as well as the case in Indiana, was probably influenced by the fact, that that line was the bound of the state, as one of the cases intimates; and beyond question, *Howard* v. *Ingersoll*, 13 How. 381, was influenced by a similar fact; that is, by the line between Georgia and Alabama, which places the party's bound on the top of the bank of the Chattahoochee.

One or two cases must be noticed, in order to show that they have not been overlooked. *Emans* v. *Turnbull*, 2 Johns. 313, is probably substantially answered by the doc-

trine in *Gould* v. *Hudson River R. R. Co.*, 2 Seld. 522, which holds that the riparian owner on the Hudson river, has no property in the shore between high and low water, entitling him to compensation when the state authorized the company to construct a road along the shore. And though the answer should not be deemed complete, still the former case could not be permitted to control the conclusion in the present one.

The case of *Blundell* v. *Catterall*, 5 B. & Ald. 268 (7 E. C. L. R. 91), cannot be passed in silence. It is a strange case, and much more, it is conceived, has been made of it than it warrants. All that was decided upon the question of the common law right, was clearly extra-judicial, and it sets up a doctrine which probably would not be listened to in this country; that is, that there is no common law right to bathe in the sea! The case is doubted and dissented from in many others, and an English writer, Hall, in his treatise on the rights of the crown, &c., finds much fault with it. The case finds that the lord of the manor, was the owner of the shore down to low water, and therefore it was, that the defendant had not the right to go over the shore with horses and carriages, and bathing machines, to the shore, for the purpose of bathing; and the judges in their several opinions, say that this is the only question, yet they go on to decide a much broader one, which was not involved. In its fullest extent, it does not help us to a conclusion on the present question. It would be extremely ungrateful to be obliged to determine a question of so much consequence as the one before us, upon the unreasoned, imperfect, and merely local views of some of the eastern cases, and upon what are no more than *obita dicta*. The only two cases relating to our large rivers, which seem to stand upon the common law rule, are *Middleton* v. *Pritchard*, 3 Scam. 510, and *Morgan* v. *Reading*, 3 S. & M. 366, which have the merit of carrying out the common law rule consistently, and not breaking it to pieces, and making a new one.

Although it should be that we have erred in the views taken of the foregoing cases, still we feel constrained to

think, that in all that has been done in relation to this great river, it was intended to set it free from all trammels and technicalities, and to make it a highway, and public, in a sense correspondent with the magnitude of the stream, and of the public interests therein. And all the reasoning which drives back the private owner from the middle of the stream, and demands an absolutely public water and bed to low water, demands the same, precisely, up to high water. It is difficult in the extreme, to find the reasoning, if such there be, which departs from the common law rule as to the thread of the stream, and then stops at low water. The common law knows but two lines, the *filum aquæ*, and high water. If the stream be navigable, the owner's bound is the one; if not navigable, his bound is the other; and although there is some naked authority in favor of dividing between them, there is none based upon legal rule or reasoning. By this review, it is perceived, that force and effect is to be given to various facts, circumstances, and considerations, which are scarcely alluded to in some of the cases, and which have no place at all in the older and eastern cases; such are the treaties, compacts, ordinances, and constitutions; the laws relative to the survey and sale o the public lands; the declaration that these rivers shall forever remain highways, free to all citizens, &c. And we find that the fact of the government selling islands separate from, and independent of, the mainland, had its weight at an early stage of the argument, in Pennsylvania, and even in New York. The fact, also, that the Mississippi river is the boundary between numerous, independent states, is of great importance, as we have found the cases recognizing the idea, that where a river is the boundary between nations and states, the common law rule does not apply. All these, and such considerations, formed absolutely no part of the older cases, and enter much less into some of the later ones, than they should. But, under these views, and with a thought of how the terms "public highway" and "navigable," are a hundred times used in relation to these rivers, how is it pos-

sible to clothe them with the narrow, straightening garments of a technical reasoning?

When the Mississippi river was declared a public highway, in the solemn instruments before referred to, it was not in any technical sense, but in a high, broad, and free understanding; and it was placed upon the same ground with a river navigable at common law. And as we cannot take the *medium filum* as our line, we think we are obeying the settled rules of law, in considering the stream as declared a navigable river in the legal sense, and as subject to the consequences which attach to such waters at common law. The conclusion, therefore, is that plaintiff has not a title to the land between high and low water, so as to enable him to maintain this action for taking the sand. This opinion need not preclude the idea, that the adjacent owner may have some rights between high and low water, which are even peculiar to himself, and not common. Nor does it necessarily determine the question of the right to make wharves or structures for the convenience of navigation and commerce, and other questions of a similar nature. Nor are municipal powers affected; nor does it imply an unbounded license, on the other side, for every one to do what he pleases, even to the detriment of the owner; nor for an unlimited occupation of the shore.

The maxim, *sic utere tuo ut alienum non lædas*, still holds; and the powers of an action on the case, of indictment, and injunction, still remain.

The judgment of the District Court is reversed, and a writ of *procedendo* will issue accordingly.

MILLER *v.* BRYAN.

Where M. brought his action of replevin against B., who claimed to hold the property as sheriff, by virtue of certain executions against S., in which action the principal question was, whether a certain sale of the property by S. to M. was fraudulent and void as to the creditors of S., and on the trial the court instructed the jury as follows: "1. If they believe from the evidence, that the sale of the property by S. to M. was made to defraud S.'s creditors, the sale was fraudulent and void. 2. If they are satisfied by the weight of evidence, that S. sold the property, and still kept possession, the sale was void, unless there was a bill of sale, acknowledged and recorded, like deeds of real estate. 3. If they find that defendant levied on the property, and held it, by virtue of his office, as sheriff, they will find for the defendant," to which instructions the defendant excepted; *Held*, 1. That giving the word *sale* its proper, legal signification, and bearing in mind that there must be a vendee as well as a vendor in such sales, the first instruction was correct. 2. That if the second instruction means, that the sale would be void as between M. and S., unless there was a bill of sale, executed, acknowledged, and recorded, it is clearly erroneous; but that if it related to the rights of existing creditors of S. or subsequent purchasers, without notice, it was substantially correct. 3. That the third instruction was erroneous, and could be true in no probable state of the case.

Appeal from the Warren District Court.

THE defendant, as sheriff of Warren county, by virtue of several writs of attachment, seized certain goods and chattels as the property of one Stewart, the defendant, on said writs. The plaintiff replevied said property, claiming the same to be his, and to be entitled to the immediate possession of the same. The issue being made, the principal question would appear to have been, whether a certain sale from Stewart to Miller was or was not fraudulent and void as to the creditors of Stewart. On the trial, the court, at the request of the defendant, instructed the jury as follows: "1st. If they believe from the evidence, that the sale of the property from Stewart to Miller was made to defraud Stewart's creditors, the sale was fraudulent and void.

"2d. If they are satisfied by the weight of evidence, that Stewart sold the property, and still kept possession, the sale

was void, unless there was a bill of sale acknowledged and recorded, like deeds of real estate.

"3d. If they find that defendant levied on the property, and held it by virtue of his office, as sheriff, they will find for the defendant." The giving of these instructions was objected to by the plaintiff, and their correctness is the only question now presented for our consideration.

Clarke & Henley, for the appellant.

P. Gad Bryan, for the appellee.

WRIGHT, C. J.—We think the first instruction was right. Plaintiff insists that the sale would not be void, unless he participated in, or had knowledge, at the time of his purchase, of Stewart's fraudulent intentions; and that the instructions should have been so qualified. It would certainly have more fully stated the law, if thus qualified; but when fairly construed, it cannot be said to establish the doctrine, that the fraudulent intention of the vendor alone, would make the sale void. It does not say, that if Stewart had a fraudulent intention, but if the sale was made to defraud the creditors of Stewart, it would be void. Giving the word sale its proper legal signification, and bearing in mind that there must be a vendee as well as a vendor in such sales, we cannot think that the jury could reasonably have been misled by this instruction. To have prevented any possible, or even probable, misapprehension by the jury, the plaintiff might well have asked for the qualification now suggested. Having failed to do so, we do not think he can now complain.

If the second instruction means that the sale would be void as between Miller and Stewart, unless there was a bill of sale, executed, acknowledged, and recorded, like deeds of real estate, it is clearly erroneous. We suppose, however, that the instruction relates to the rights of the existing creditors of the said Stewart, or subsequent purchasers from him. As to them, the sale would be void where the vendor

retained the actual possession of the property, unless they had notice of such sale, or unless there was a written instrument conveying the same, executed, acknowledged, and filed, like conveyances of real estate. Code, § 1193. With the qualification, that the sale would not be valid against such creditors, or purchasers without notice, we think the instruction substantially correct.

The last instruction, we think, is wrong. We are unable to see any probable state of case, in which it would be true. If this instruction is correct, then, indeed, the plaintiff's own petition fails substantially to show a right to maintain this action, for it states, as required by the Code, § 1995, that the sheriff holds the property by virtue of certain writs of attachment, in his hands as such officer. In these cases, the sheriff is a necessary, and yet really the nominal, party defendant. Those really interested are the attaching or execution plaintiffs, and to say that if a sheriff levies upon and holds property by virtue of his office, no other person can maintain replevin against him, would be to virtually subject the property of A. to the payment of the debt of B. If this property had been taken by virtue of any legal process against Miller, and was not exempt from seizure thereon, this instruction might be correct. But a process against Stewart, would not be a justification to the sheriff in attaching the property of Miller; and whether he did so attach the property of Miller, as already stated, was the controverted question.

Judgment reversed.

WOODWARD *v.* ATWATER.

In whatever manner a controversy is to be settled, the subject matter of it must be ascertained and made definite.

The only exception to this rule is, where there is a submission to arbitrators of all matters in controversy between the parties, which would embrace each particular matter.

Where an agreement to submit to arbitrators read as follows: "We, M. W. and D. C. A., severally agree and bind ourselves to arbitrate a matter of controversy relating to a certain piece of land in said county. We have agreed on the following persons as arbitrators in said cause, to wit: Henry Crow, Martin Braddock, and David Macey, all of Marshall county; and also further agree that they will appear before Elias Walraven, acting justice of the peace, [in] said county, who will have charge of the case, according to law. We agree to appear before said court the 14th day of January, A. D. 1854;" and where the said arbitrators awarded "that the said A. should pay to said W. the sum of fifty dollars for a claim that the said W. held on a piece of land named in their submission, which land was entered by said A.;" *Held*, That both the submission and award were bad for uncertainty.

Appeal from the Marshall District Court.

THIS was a submission to arbitration by the following article:

"MARIETTA, January 7th, 1854.

"We, Mahlon Woodward and Dewit C. Atwater, of Marshall county, Iowa, severally agree and bind ourselves to arbitrate a matter of controversy relating to a certain piece of land in said county. We have agreed on the following persons as arbitrators in said case, to wit: Henry Crow, Martin Braddock, and David Macey, all of Marshall county; and also further agree that they will appear before Elias Walraven, acting justice of the peace, in said county, who will have charge of the case, according to law. We agree to appear before said court the 14th day of January, A. D. 1854." This is signed by the parties, and acknowledged before a justice of the peace.

The essence of the arbitrators' award is, that the said Atwater should pay to said Woodward, the sum of fifty dollars,

for a claim that the said Mahlon Woodward held on the piece of land named in their submission, which land was entered by said Atwater." This was returned to the justice named, whose transcript from his docket recites, that this cause was brought for a claim on a certain piece of land being and lying in the county of Marshall, Iowa," &c. It then recites the proceedings and award, and renders judgment against the defendant. Atwater appealed from the judgment of the justice, and in the District Court, at the September term, 1855, filed a motion to set aside the above judgment and proceedings:

First. For obscurity and uncertainty in the submission to arbitration.

Second. For want of jurisdiction in the justice in receiving the award.

Third. For want of jurisdiction in the justice, on the ground that the matter in controversy relates to the title to real estate. This motion was overruled by the District Court, and a motion of the plaintiff to affirm the judgment, was sustained.

The appeal is from this judgment; and the decision of the court on this motion, is assigned for error.

Jas. D. Templin, for the appellant.

WOODWARD, J.(1)—When parties endeavor to settle their differences without litigation, every court is predisposed to favor them in the attempt. Yet, when they come into court, some leading and important rules must be observed. In whatever manner a controversy is to be settled, the subject matter of it must be ascertained and made definite. The only exception to this is, when the submission is of all matters in controversy between the parties, which would embrace each particular. In the case at bar, there is, in effect,

(1) ISBELL, J., having left the bench, took no part in the decision of this cause.

nothing submitted by the words, "a matter of controversy relating to a certain piece of land in Marshall county." Nothing could be more indefinite. It does not appear what the question was relating to the land, nor what land the question related to. Neither the award, nor the judgment of the justice, aid the matter much, even if they were allowed to do so. It may well be doubted, whether this award, or this submission, would constitute a bar to any other subsequent claim or action. Code, § 2099; 1 Bac. Ab. 282, 289; *Thomas* v. *Molier*, 1 and 4 Ohio, 565; *Lyle* v. *Rodgers*, 5 Wheat. 394; 1 Am. Com. Law, 466. Both the submission and the award, are bad. But the award follows the submission, which is in accordance with one of the rules on the subject.

Although this award is definite in ordering one party to pay the other a certain sum of money, yet it must be adjudicated upon rules which would apply to other cases. Suppose the matter related to the title to the land (and nothing shows that it did not), how is judgment to be entered? and how is it to be known as to what land the title was settled? And so, if it was a question of possession, how could a writ of possession issue?

The judgment of the District Court is reversed, and a *procedendo* will issue, directing that court to set aside the judgment of the justice of the peace.

Busick *v.* Bumm.

Where the transcript of a record does not show what disposition was made of a motion filed in the court below, this court will presume that the motion was waived.

Where in action on a promissory note, made by the defendant, payable to the plaintiff, the petition omitted the averment, "which said promissory note has now become the property of your petitioner," but which otherwise followed substantially the form given in the Code, to which an answer was filed, denying the allegations of the petition; and where, on the trial, the defendant

objected to the note being read in evidence, which objection was overruled; and where after verdict, the defendant moved to arrest the judgment, for the reason that the petition did not set forth a sufficient cause of action to entitle the plaintiff to offer any evidence under it, which motion was overruled; *Held*, That the evidence was properly admitted, and the motion properly overruled.

The form for petitions given in the Code, need not be followed strictly—a petition equivalent thereto, is sufficient.

Appeal from the Polk District Court.

In this case, the usual notice under the Code was issued, and placed in the hands of the sheriff, to which he made the following return: "Served the within notice on the within named Henry Bumm, by reading it to him personally. D. B. Spaulding, sheriff." The action is brought upon a promissory note made by defendant to plaintiff, and the petition follows almost the form given in the Code, except that it avers the note was made to plaintiff, and omits the words, "which said promissory note has now become the property of your petitioner." A motion was made to quash the notice, and an answer was filed, taking issue upon the allegations contained in the petition. On the trial, the defendant, on the offer of the plaintiff to read the note in evidence, objected, and the objection was overruled, to which defendant excepted. Judgment being rendered for the plaintiff, defendant moved in arrest of judgment, because of the improper admission of said note in evidence, and because the petition did not set forth a sufficient cause of action, to entitle plaintiff to offer any evidence under it. This was overruled, and defendant appeals.

Brown & Elwood, for the appellant.

Jewett & Hull, for the appellee.

Wright, C. J.—Two errors are assigned:—First, that the court erred in refusing to quash the notice. As to this, it is sufficient to say, that there is nothing to show that said

motion was overruled, or that the court did refuse to quash the notice. There is a motion filed, but what action was had on it, is nowhere shown. It will be time enough to decide that question when it has been passed upon by the court below. We can only presume that the motion was waived by defendant. At all events, he can in this case, claim nothing by it, after trial and judgment.

The second error relates to the admission of the note in evidence. And this objection, as we understand it, is based upon the claimed fact, that no issue was made by the pleadings, or if any, an immaterial one; for that, as there was no averment that the note was the property of the petitioner, therefore the petition was fatally defective—no testimony could be received, and no judgment rendered thereon. This objection has neither substance or technicality to sustain it. In the first place, the form given in the Code need not be followed strictly. A petition equivalent thereto, is sufficient. This form contemplates the bringing of a suit by the assignee or bearer of a note, made payable to another; and in such case, the use of the words omitted, in this case, become pertinent. But where suit is brought by the original payee, as in this case, it is mere form, at least, to aver that the note has become his property. But, if material, it was more properly the subject of a demurrer, than of objection on the trial. Immaterial errors, variances, or defects, are to be disregarded, and none are to be deemed material, unless the court is satisfied that the objecting party will be prejudiced by disregarding or allowing them to be amended. Code, §§ 1757–8. As we have frequently said heretofore, this court will apply these sections, and all of the equitable provisions of the Code, in the spirit as well as letter, and especially so after issue joined and verdict. We can see no prejudice that could possibly result by disregarding the defect in the petition, if defect it was.

Judgment affirmed.

SULLIVAN *v.* FRINK & CO.

Where, in a case of arbitration, one of the arbitrators informed one of the parties, that no testimony would be received on a certain point in dispute, and in consequence of such information, the party did not attend with his witnesses; and where the arbitrators did admit evidence upon that subject from the opposite side, without any wrong intention, and without notice to the absent party; *Held*, That the evidence was improperly admitted, and the award was set aside.

An award can be set aside only for mistake, misconduct, partiality, or fraud, in the arbitrators.

In the legal idea of misconduct, an evil *intention* is not a necessary ingredient.

Where the act of the arbitrators prejudiced, or had a strong tendency to prejudice, the rights of one of the parties, even though no wrong intent entered into the act, the award should be set aside.

Appeal from the Dubuque District Court.

THIS was an application to set aside an award made under the following agreement for submission:

"Whereas Michael Otis Sullivan was upset in a stage of John Frink & Co.'s, on or about the 15th day of March, A. D. 1854, under circumstances rendering the said John Frink & Co. liable to pay said Sullivan his legal damages; and whereas there is no dispute about the liability, and as the parties are mutually desirous of settling the amount of damages to be paid, in an amicable way, and without a resort to law, it is therefore agreed by the parties, that the question of damages shall be left to the arbitrament and award of Thomas S. Wilson, John W. Finley, and such third person as the said Wilson and Finley may call in to their assistance, who shall proceed to ascertain the damages aforesaid within ten days from the date hereof; and that the decision of said arbitrators, or a majority thereof, shall be final and conclusive. The said arbitrators to take such steps to arrive at the amount of damages to be paid to said Sullivan, as they may deem meet and proper, and are to consider all facts and circumstances connected with the case, as a

court and jury ought or could consider the same, legally. It is further agreed, that the said Frink and Walker shall pay the award of said arbitrators, within ten days after being notified thereof, and in case of default in said payment, the said arbitrators to render their award to the District Court of Dubuque county, and execution to issue thereon. The arbitration to be conducted without attorneys on either side." This agreement is signed by the parties and acknowledged. An award of $1,150 damages was made and returned to the District Court. The application to set aside this award, was based on sundry affidavits, the substance of which was as follows:

The affidavit of R. J. Thomas, who was third arbitrator, called in by Wilson and Finley, shows that at the trial, a witness by the name of Briggs was introduced; that as near as deponent can remember, neither said Briggs nor the other witnesses were sworn; that Briggs testified that at the time the stage was upset, which occasioned the injury, the driver was racing horses with another stage, and driving very fast, and in a reckless manner; and that he drove on a sideling place, over a high elevation, elevating the wheels on one side two feet and more above the other, which occasioned the upsetting; that witness measured the rise of ground; that the testimony of this witness had a very material bearing on the mind of deponent, in forming his opinion in the amount of damages which was awarded to said Sullivan; that deponent, at the time, considered the actual damages to be rather slight, but supposed from the testimony of said witness, that the reckless driving and racing was a proper subject for exemplary damages, to restrain the stage company from like conduct: That deponent further says that there was a priest introduced by said Sullivan, who as this deponent believes, was not sworn, but made a statement which was taken as evidence by the arbitrators, in relation to the previous good health of Sullivan; that deponent did not know at the time of the arbitration, whether witnesses were to be introduced or not, or as to what points testimony was to be taken, though he noticed that Dr. Finley suggested something

against the propriety of the introduction of testimony; that this testimony had material influence on the mind of deponent, and he believes on the minds of the arbitrators, and he knows that it did on his.

The affidavit of James Huff, who was the agent of the defendant, shows in substance, that on the morning of the day of the arbitration, he procured two witnesses—the driver of the stage which was upset, and the driver of the one immediately behind it at the time of the accident; that he was not fully apprised of the manner the arbitration was to be conducted; that as the agent of Frink & Co. he called upon the attorney of defendant, to ascertain whether the testimony in relation to the circumstances of the upsetting of the stage, would be admissible, and that the attorney informed him he thought not, under his understanding of the submission, but for safety to call upon the arbitrators, and ascertain whether testimony on either side would; that in pursuance of this suggestion, he called immediately on Finley, one of the arbitrators, which was only a few minutes previous to their meeting, and said Finley informed deponent that the question in relation to the circumstances of the upsetting, would not be inquired into, and no testimony would be received thereon, either on the one side or the other; that in consequence thereof, affiant refrained from introducing said witnesses before the arbitrators, and he refrained for the sole reason that he was informed and believed, that it would be improper to introduce such testimony, and that the arbitrators would not receive it; and that no testimony whatever in relation to the upsetting, would be admitted from either side; but that affiant is informed and believes, the arbitrators did receive testimony from the other side in relation thereto—to wit: that Frink & Co.'s stage and another were racing at the time the stage was upset; that affiant could have proved by the above named witness this was not the fact, had he known that they could or would have been admitted; that affiant procured those witnesses to be ready with a view of contradicting the testimony which was really introduced. Affiant says, that after asking said

Finley whether testimony would be admitted, and receiving a reply in the negative, he asked him if the parties concerned were to be admitted, and he replied, no, they did not want anybody there at all, but themselves, and any physician that might call upon them; that affiant refrained from being present at the arbitration in consequence of this information; and that he was not aware until afterward, that said Sullivan had been admitted into the room, or that he had been allowed to introduce witnesses, and especially witnesses as to racing, or as to the circumstances of the upsetting. Affiant says that he believes that said Finley in giving him said information, acted in good faith at the time, but that the subsequent deviation from the intended course, had a prejudicial effect upon the interests of said Frink & Co., which was probably not contemplated, foreseen, or intended by said Finley.

The affidavits of John Collins, the driver of the coach in which Sullivan was injured, and of John F. Lane, the driver of a coach in company at the time, are also appended, to the effect that the stage in which Sullivan was at the time of the accident, was being driven slowly and carefully.

There is also the affidavit of T. S. Wilson, one of the arbitrators of record, as follows: "I have read the deposition of R. J. Thomas, and say that said arbitration was conducted fairly, and so far as I know, in accordance with the wishes of said parties; that said Briggs was introduced for the purpose of showing the manner in which the injury to said Sullivan was inflicted, in order that those arbitrators who were physicians, might judge of the permanency of the injury, and not for the purpose of showing the conduct of the stage driver; that whether the witnesses were sworn or not, affiant does not recollect, as the arbitrators understood that this was optional with them; that said Thomas made no objections to any of the proceedings; that the amount of the award was fixed upon by said arbitrators because physicians who attended said Sullivan in his sickness, stated that said Sullivan would never recover from the injury; this affiant would, however, in justice state, that he now

thinks the amount of said award high, and that said injury was not so great as said arbitrators were led by the testimony to believe, but still said award was based upon uncontradicted testimony, and was the honest verdict of said arbitrators.

This latter affidavit was placed of record by Sullivan. The others were filed by defendant. The court below refused to disturb the award, and defendant appeals.

Smith, McKinlay & Poor, for the appellant.

Under the Code, § 2111, awards are placed upon the same footing as the verdict of a jury. Section 2110 provides for a rehearing, or a recommitment. Section 2112 makes affidavits part of the record to be sent up; in this case the affidavits are all included in the bill of exceptions. A fair construction of the three sections, clearly puts awards upon the footing of a verdict, with authority to the court to grant a new trial for any good and sufficient reason, and an appeal can be had to the Supreme Court from the decision.

This submission is substantially under section 2099 of the Code. The question, then, is whether there is substantial ground for a new trial? It is clear from the affidavit of Thomas, one of the arbitrators, that the arbitrators mistook the law in allowing evidence of racing, &c., to aggravate the damages; it is equally clear that smart money and exemplary damages were allowed for this, whereas the damages should have been limited to the actual injury and loss of Sullivan. See 2 Greenleaf's Evidence, § 253, and the note, where the matter is discussed at length in the note. Judge WILSON says in his affidavit, taken on the part of Sullivan, that he thought at the time they done right (we believe they all intended to do right), but he now thinks that they gave too much damages. Then, it is quite as clear from the affidavit of Huff, and of two other witnesses, that there was no racing; and that Frink, by his agent, was ready to disprove the testimony offered to show that there was, and was only prevented by the arbitrators.

There was, then, a wrong rule of law adopted in assessing

damages. The arbitrators exceeded the law; and, we say, they exceeded the terms of the submission, in going into the matter of exemplary damages; for it was only the actual injury received that they had any right to inquire into, either by the law or by the terms of the submission. Any mere technical objection ought to have no weight in such an application as this; it is only substantial matter that should be regarded. The mere fact that the witnesses were not sworn, who testified to the racing, would not, of itself, be sufficient ground for a new trial; but where the parties are not present, in consequence of the direction of the arbitrators, or the terms of the submission, and unsworn and untrue statements are made, which did have a material influence upon the amount of damages; taken as a whole, the case is a strong case for a new trial. The sworn affidavits in this case, are to be taken as true, especially when there are two affidavits against the statement of one witness, who was not sworn. The admission of illegal testimony, which probably had an effect upon the jury, is a good cause for a new trial.

In this case the testimony was illegal and improper, and it is not necessary to show that all the arbitrators or jurors were alike influenced by it. The mere admission of it raises the presumption that it had an influence; but the evidence shows that the fact that the stage was racing when it upset, had more influence with one of the arbitrators than did the real injury, and it is fair to presume it had its influence with the others. It was the intent of the party who introduced it, that it should show a flagrant case, a great outrage, that called for exemplary damages. The arbitrators think they gave too much, and we think the same thing, and hope the court will exercise the power given by the Code, of treating this precisely as an application for a new trial on the verdict of a jury.

Wm. Vandever and *D. S. Wilson*, for the appellee.

1. The motion made to set aside the award, cannot be sustained, because it does not appear that there was fraud, mistake, or misconduct, partiality or favor, on the part of the

arbitrators. See *Merritt* v. *Merritt*, 11 Ill. 567; *Mitchell* v. *Bush*, 7 Cowen, 185; *Winship* v. *Jewett*, 1 Barr, 173; 9 Johns. 212; 14 Ib. 105; *Vaughn* v. *Graham*, 11 Missouri, 576; *Herrick* v. *Blair*, 1 Johns. Ch. 101; *Shermer* v. *Beale*, 1 Wash. 11; *Pleasants* v. *Ross*, Ib. 156; *Tidd* v. *Bailore*, 2 Johns. Ch. 551; *Brown* v. *Greene & Noyes*, 7 Conn. 524.

2. The exclusion of the parties by the arbitrators, was proper, and constitutes no ground for setting aside the award. Watson on Award, 117.

3. Arbitrators cannot impeach their award, even by their own testimony. 1 John. Ch. 101; 3 Paige, 137; 3 Esp. 38; Bul. N. P. 236; Peake's N. P. C. 6; 1 Esp. 143; 3 Ib. 113; 2 Ver. 717; 2 Johns. Ch. 349; 4 Johns. 487; 4 B. & Pull. 326; 4 Binney, 150.

4. Arbitrators are judges of the parties' own choosing; their proceedings and award are treated with great liberality; and even a mistake and doubtful point, often will not open an award. 1 Johns. Ch. 101; 2 Vern. 251; Ib. 705; 1 Atk. 63; 3 Ib. 486; Ib. 529; Ib. 644; 1 Ves. jr. 369; 2 Ib. 22; 13 East, 357.

5. Excess in the amount of award is no ground for setting it aside, unless it be so great as to indicate fraud. 4 and 5 Kentucky, 228; *Underhill* v. *Van Cortland*, 2 Johns. Ch. 339.

6. Change of opinion by one or all of the arbitrators, after award rendered, cannot affect the award. See *Cleaveland* v. *Dixon*, 4 J. J. Marsh. 228.

WOODWARD, J.(1)—This award cannot be sustained. One thing in the case seems difficult to understand. One of the affidavits says, the testimony of Briggs "was introduced for the purpose of showing the manner in which the injury was inflicted, in order that those arbitrators who were physicians, might judge of the permanency of the injury, and not for

(1) This cause having been argued before STOCKTON, J., came upon the bench, he took no part in the decision. ISRELL, J., left the bench before its decision.

the purpose of showing the conduct of the driver." Now, the article of submission itself states the manner. It says, "Whereas Michael Otis Sullivan was *upset* in a stage of John Frink & Co., under circumstances rendering John Frink & Co. liable to pay said Sullivan his legal damages, and whereas there is no dispute about the liability," &c. There was, therefore, no testimony needed to show the manner, if this merely was wanted. And if anything else—if any circumstances were wanted—both parties should have been allowed to be heard in testimony. The plaintiff has cited law, and supported it by sufficient authority, which we have no disposition to controvert.

The principal proposition is, that an award can be set aside only for mistake, misconduct, partiality, or fraud, in the arbitrators. But it must be remembered, that in the legal idea of misconduct, an evil intention is not a necessary ingredient. The question is, whether that has not been done which prejudiced, or had a strong tendency to prejudice, the rights of one of the parties, even though no wrong intent entered into it. We think something of this character has been done. One of the parties was informed that no testimony, or none on a certain question, pertaining to the matter, would be heard. But such testimony was heard. It is immaterial that the representation was made innocently or ignorantly. The *fact* was otherwise; and in our opinion, it is immaterial that the mind of the arbitrator, Wilson, was not influenced by it. It is evident that Thomas was, and we are left in uncertainty as to Finley, the other arbitrator. If this testimony had not been heard, Thomas would not have assented to this award; and we cannot say but that he might have influenced the others to a different conclusion. It is not said that arbitrators must in all cases hear testimony, nor what they must hear, but only that if they receive it on one side, they must on the other. If it is provided that the arbitrators may take such steps to arrive at the amount of damages as they may deem proper, this does not mean that they may violate the principles of justice. There was misconduct or partiality in the matter of fact, or

the result, although none in the motive. The case of *Walker* v. *Frobisher*, 6 Vesey, 70, is very analogous. The chancellor's opinion indicates the facts sufficiently. He says: "The arbitrator had examined different witnesses at different times, in the presence of the parties. He recommended to them not to produce any more witnesses. After that, he heard others on one side. He swears it had no effect on his award. I believe him. He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles."

The language of the statute, that the award "shall have the force and effect of the verdict of a jury," must not be stretched too far. Its principal intent is that judgment may be rendered upon it, as upon a verdict. This is manifested by the words which immediately follow in the same section: "Judgment may be entered, and execution issued accordingly."

Judgment reversed.

PINNEY *v.* THOMPSON.

Where it is manifest that a writing does not constitute the whole contract, as where the subject matter, or persons, and the like, are not defined, parol evidence is admissible to show the remainder.

Where in an action of trespass for entering upon land, and for cutting and carrying away timber, the defendants justified under a contract with the plaintiff's grantor, made before his purchase, and alleged that the said grantor sold one of the defendants twenty-three hundred linear feet of standing timber, at five cents per foot, for which a part of the consideration was paid down, and the balance to be paid after the timber was taken; and that plaintiff had express notice of this contract, and purchased with reference to it, which contract was in writing, and had been destroyed, and which was established by parol evidence; and where the defendants offered to prove that there was a verbal agreement that the timber mentioned in the contract, was to be taken from a tract of two hundred and forty acres, of which the *locus in quo* was part, to which evidence the plaintiff objected, but the objection was overruled, and the evidence admitted; *Held*, That the evidence was properly admitted.

Appeal from the Johnson District Court.

THE plaintiff sued the defendants for trespass, in entering upon his land, and cutting and carrying away timber therefrom. The plaintiff purchased the land of the executors of the will of James P. Carleton, deceased. The defendants justified under a license or contract with the same executors, made before the plaintiff purchased. They allege that the executors sold to said E. B. Thompson twenty-three hundred linear feet of standing timber, at five cents per foot, for which a part of the consideration was to be, and was, paid down, and the balance was to be paid after the timber was taken. The defendants aver that the plaintiff had express notice of this contract, and that he bought with reference to it. It was shown that the contract, as stated above, was in writing, and that the writing was destroyed. Parol evidence of its contents was given. The defendants then offered to prove that there was a verbal agreement, that the timber mentioned in the contract was to be taken from a tract of two hundred and forty acres of land, of which the *locus in quo* was part; to which the plaintiff objected. The court overruled the objection, and permitted the evidence to be given, to which the plaintiff excepted. This presents the only question in the case.

Wm. E. Miller, for the appellant.

Edmonds & Ransom, for the appellees.

WOODWARD, J.—There was no error in the ruling of the court. This is not a case where the law requires the contract to be in writing. It is one where a part is reduced to writing, and a part is not; and where it is manifest that the writing does not constitute the whole, parol evidence is admissible to show the remainder. 2 Pars. on Contract, 61. Thus, when the subject matter, or persons, and the like, are not defined in the writing, parol evidence is receivable to

point them out. Pars. *ut supra*, 3; Ib. 148; *Jackson ex dem. Van Vechten et al.* v. *Sill et al.*, 11 Johns. 201; *Jackson ex dem. Lowell* v. *Parkhurst*, 4 Wend. 369. So, if the language is applicable to several of any kind of objects, as several pieces of land, several parcels of goods; in other words, if the particulars are indefinite, so that it is not known to which the contract relates, the evidence is admissible. 2 Greenl. Ev. § 288.

In the case before us, *what timber* was intended, is manifestly left undefined, and this must necessarily be pointed out by parol. Otherwise, there is no contract.

The judgment of the District Court is affirmed.

BARRON *v.* EASTON *et al.*

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When a party has two remedies given by the law, he has his election, and cannot be compelled to take either one.

Thus, on title bonds, or contracts to convey land, the party generally has a right to an action for damages for non-performance, or to a bill in chancery, to compel a specific performance; and he cannot be *driven* to take the action for damages.

O. M. B., being the warrantee of land warrant No. 10,215, sold it to E., who sent it, with others, to M., to be located on contract. On the 23d of March, 1852, M. entered into an agreement with T. F. B., and at his request, located the warrant on the southeast quarter of section five, in township 79, north of range 43, and gave T. F. B. a bond, in M.'s own name, covenanting to make, or procure to be made, a deed for the premises, and reciting that T. F. B. had executed his note to E. for the payment of the warrant. On the 20th of September, 1852, the warrant being then located, O. M. B. executed to E. a title bond for the said premises, running to him, his executors, administrators, and assigns, covenanting to convey the said land on or before the 12th of June, 1853, provided E. should, on or before that day, pay said O. M. B. the sum of $160.00. Before the day of payment, O. M. B. died, and there was no administrator, nor any one to whom to pay the money, until after the debt became due, when H. was appointed administrator. After this, T. F. B., not knowing that the legal title to the land was in O. M. B., but supposing it to be in E., filed his bill against E. for a specific performance of the contract to convey, made by M., and in October, 1854, the District Court of Scott county, rendered a decree in his favor against E. for

the conveyance of the land. T. F. B. afterwards, August 21, 1855, filed his bill in the same court against E. and the heirs and administrator of O. M. B., praying for the specific performance of the contract between O. M. B. and E., alleging a tender of the money due to H., the administrator, and that the money due E. had been paid into court, and remained in the hands of the clerk; and praying that H. and the heirs of O. M. B. may be decreed to convey the premises to the petitioner, and that the money paid into court for E. may be decreed to be paid to H. in discharge of the obligation under the bond from O. M. B. to E. To this bill there was a demurrer, which was overruled by the court.

Held, 1. That under the decree against E., T. F. B. stands in the place of E., and can claim a performance of the contract between O. M. B. and E.

2. That the covenants in the bond from O. M. B. to E. were mutual and dependent, and neither is strictly a condition precedent.

3. That the payment of the money on the part of E. was prevented by the death of O. M. B., and this being the act of God, saved the forfeiture.

4. That the demurrer was properly overruled.

Appeal from the Scott District Court.

On the 21st of August, 1855, Barron filed his bill in equity in the District Court in Scott county, against Eliphalet Easton, William Hall, administrator of Ora M. Burke, deceased, Albert G. Burke, Charles Smith and Eliza, his wife, formerly Eliza Burke, and Ann and Howard Burke, minors, praying for the specific performance of a contract for the conveyance of the southeast quarter of section five, township seventy-nine north, range four east, which was located by military bounty land warrant number 10,215. The bill alleges that O. M. Burke, being the warrantee of this warrant, sold it to Easton: that on 20th September, 1852, the said warrant being then located on the foregoing land, he gave to Easton a title bond, running to him, his executors, administrators, and assigns, covenanting to convey the said tract of land on or before the 12th day of June, 1853, provided said Easton should, on or before that day, pay him the sum of one hundred and sixty dollars, the price agreed; that before that time, Burke died, and there was no administrator, nor any one to whom to pay the money, until some time after, when the said Hall was appointed administrator; that on the 17th day of February, 1852, before the warrant was located, Easton, who had purchased it,

sent it with others to J. W. McCaddon, with a request that he would locate them forthwith, and try to have them located on contract; that on the 23d day of March, 1852, McCaddon entered into an agreement with Barron, located the warrant on this land, at his request, as is understood, and gave him (Barron) a bond in his own name, covenanting to make or procure a deed; but reciting in the bond, that Barron had given his note to Easton for the payment of the money. After this, Barron filed his bill against Easton for a specific performance of his contract, and such proceedings were had in the cause, that in October, 1854, in the District Court in Scott county, he obtained a decree for a specific performance against Easton. At this time Barron did not know, as he avers, that the legal title was still in Burke, but supposed it to be in Easton. The bill alleges that a tender of the money due was made to Hall, the administrator, and also that the money due Easton had been paid into court, and remains in the clerk's hands. The bill then prays that the said administrator, and the said heirs, may be ordered to make a conveyance of the said land to the petitioner, and that the money paid into court for said Easton, under the decree against him, or so much thereof as may be necessary, be decreed to be paid to the said administrator, in discharge of the obligation under the bond from Burke to Easton.

To this bill the defendants (except Easton, who makes default) demur, upon the following grounds:

First. That there is no equity shown; for that it is brought to enforce a contract upon a bond given by Burke to Easton, his administrators or assignees; and that complainant does not allege that he is an administrator or assignee; and that it appears that there is no privity between the petitioner and the defendants.

Second. That complainant has a full remedy at law.

Third. That Easton made no contract to convey the land to complainant.

The demurrer was overruled, and the respondents appeal.

D. L. Shoray, for the appellants.

Whitaker & Grant, for the appellees.

WOODWARD, J.—The errors assigned are based upon the matter of the demurrer. The first and third grounds of demurrer amount to the same thing. As to the second ground, that complainant has a complete remedy at law, nothing is said to explain this, and show the meaning of the party or his counsel. But it is presumed he means, an action for damages on the bond. It is sufficient to say, that when a party has two remedies given by law, he has his election, and cannot be compelled to take either one. Thus, on title bonds, or contracts to convey land, the party generally has a right to an action for damages for non-performance, or to a bill in chancery, to compel performance. And he cannot be *driven* to take the action for damages.

The other grounds of demurrer resolve themselves into the one, that there is no privity between complainant and Burke, or his representatives. We will not undertake to say that the doctrine of priority of contract scarcely holds among us now; but certain it is, that its applicability is much less frequent under our law, than at common law. Our statute makes nearly every kind of contract assignable, so as to permit the assignee to maintain an action in his own name, saving of course, the right of the obligor in respect to defence and set-off. This alone might, perhaps, cover the objection, but we do not stop to discuss the matter closely. It is here said further, that Easton made no contract with Barron. This alludes to the fact, that McCaddon executed the bond to complainant. In some manner of treating the subject, we would not omit to notice Easton's letter to McCaddon, and that the bond of the latter recites that Barron had given his note *to Easton*. But the decree recovered by Barron against Easton, covers all this matter. It has been decreed by a competent court, that Easton did contract with Barron, and that he convey the land to him. In the actual state of the case, the title still being in Burke, this amounts to a decree that he convey all his right, title, and interest. Thus there has been an assignment of the contract by judg-

ment, if not otherwise; and Barron stands in the place of Easton, and can claim a performance of the contract. This view covers some of the points made in the argument, under the general objection, made in the demurrer, and they need not be noticed in detail.

But it is urged that Burke's agreement was upon a condition precedent, which Easton has not performed. The covenants are mutual and dependent, and neither is strictly a condition precedent. It is true, that Easton could not claim a deed until he paid the money; but neither could Burke sue for the money, without tendering a deed. Burke might be still with safety, till Easton performed, whilst Easton must do something, in order to bring into being his right to claim a deed; but this does not make it properly a condition precedent. But, however this may be in strict correctness, the performance of the act on the part of Easton, or his assignee, was prevented by the act of God in the death of Burke; and then, as soon as an administrator is appointed, the money is tendered. According to the commonly accepted rules of law, this saves the forfeiture.

The decree is affirmed.

Carr v. Kopp.

It is irregular to render judgment by default, where the defendant is returned "not found," without proof that a copy of the petition and notice has been sent to the defendant, or an excuse shown for not so sending it, as required by section 1826 of the Code.

Appeal from the Keokuk District Court.

This was a proceeding to perfect a tax title, under section 506 of the Code. The defendant was not personally served, but the notice being returned "not found," an order was made for publication, and the cause continued. At the next

term, proof of publication was filed, but no proof was made of the sending a copy of the petition and notice to defendant, or any excuse shown for not so sending them, as required by section 1826. Judgment for plaintiff, by default, and defendant appeals.

A. H. Patterson, for the appellant.

WRIGHT, C. J.—This judgment must be reversed. It was irregular to render a judgment by default, until such proof was made. *Byington* v. *Crosthwait et al.*, 1 Iowa, 148.

HANLON *v.* INGRAM.

A person setting out fire on his own premises, who uses such care and diligence to prevent it from spreading, as a man of ordinary caution would employ to prevent it from injuring his own property, is not liable for the damage which it may do to the premises or property of others.

De France v. *Spencer*, 2 G. Greene, 462, cited and followed.

Appeal from the Polk District Court.

THIS was an action to recover damages resulting to plaintiff, from the act of defendant in setting out fire, and permitting the same to escape, and pass on to the plaintiff's premises, and burn up a large amount of rails and other property. The defendant admits, that he did set out said fire, and that it escaped from his own premises on to those of plaintiff, but denies that it was through any carelessness or negligence on his part; and avers that he did all that was in his power to prevent said escape. On the trial, the plaintiff asked the court to instruct the jury as follows: "That if the jury are satisfied from the evidence, that the defendant set out fire upon his own land, and it passed from the defendant's land on to the plaintiff's land, and his property was burned up

and destroyed, the defendant is liable to pay the damages thus inflicted;" which instruction was refused, and plaintiff excepted. Verdict and judgment for defendant, and plaintiff appeals.

Curtis Bates, for the appellant.

J. E. Jewett, for the appellee.

WRIGHT, C. J.—This case was before us at the last June term of this court. Then it appeared that the District Court had instructed the jury, that plaintiff could not recover, without proving that defendant was guilty of *gross* negligence in setting out said fire, or permitting it to escape. This instruction was held to be erroneous, and the cause remanded for a new trial. It now appears from the foregoing instruction, that plaintiff claimed that defendant was liable, if he set out the fire, without reference to the question of negligence, or however much care, or caution, he might have taken in setting it out, or in preventing its escape.

If this was an open question in this state, we should have some hesitation in saying, that the refusal to give this instruction was correct. In *De France* v. *Spencer*, 2 G. Greene, 462, however, this very question was before the court, and the giving of a similar instruction held to be erroneous. In that case, the court below instructed the jury, that, "he who voluntarily sets out fire on his own land, is responsible for the damages done by its spreading upon the lands of others, even though he uses due diligence to restrain it." In considering this instruction, KINNEY, J., in delivering the opinion, says: "But where, from good motives, and under prudential circumstances, a person sets fire to his prairie, or woods, and uses such care and diligence to prevent it from spreading, as a man of ordinary caution would use to prevent it from injuring his own property, he is not liable for the damage which it may do to the premises or property of others. Ordinary prudence and honest motives in setting out the fire, and due diligence in preventing it from spreading,

are all that is necessary, and will constitute a good defence to an action for damages." This case is a decision of the question before us. There are several authorities sustaining the same view. In addition to those cited in this case, see *Panton* v. *Holland*, 17 Johns. 92; *Platt* v. *Johnson & Root*, 15 Johns. 213; *Thurston* v. *Hancock*, 12 Mass. 220; *Harding* v. *Fahey*, 1 G. Greene, 377; *Livingston* v. *Adams et al.*, 8 Cowen, 175. Others, again, hold the contrary doctrine, and sustain, either partially or entirely, the instructions asked by the plaintiff. *Johnson* v. *Barber*, 5 Gilm. 425; *Burton* v. *McClellan*, 2 Scam. 434; *Stout* v. *McAdams*, 2 Ib. 67.

It will thus be seen, that the courts of other states differ on the question involved, and under such circumstances, we follow the ruling heretofore made in our own courts. As a question of expediency or policy, it may well be doubted, whether the contrary rule would not give greater security to property, and more effectually guard the rights of premises injured, from fire, set out by others, and other acts lawful in themselves, but which reasonably may, and in too many instances do, result in such calamitous consequences. But, we suppose that in the case of *De France* v. *Spencer*, *supra*, the court had regard to the topography of our state —the fact that the setting out of fire was necessary, very frequently, in order to properly open farms and carry them on, and that such right had been recognized by legislation, from the earliest days of our territorial existence. All these, and other considerations, were eminently proper to be weighed, and no doubt had their appropriate influence. In view of these circumstances, therefore, we adhere to the ruling there made, and hold that the instruction asked was properly refused.

In view of the frequent instances of heavy losses from fire, so set out, we will add one other thought before closing this opinion. Each case must stand to a great extent upon its own circumstances. The liability depends upon a question of care and diligence, or negligence and want of care. Whether there was such care or caution as should excuse, or such negligence as fixes the liability, is a question of fact

for the jury—the measure of negligence, or diligence, first being defined by the court. In all cases, jurors cannot be too careful in requiring defendants to use strict caution, and great diligence, in setting out their fires, and preventing their escape. All of the circumstances should be carefully weighed, and, unless they disclose, with reasonable certainty, that in setting out the fire, and preventing its escape, the defendant has not used those precautionary measures, or made use of those measures which, as a prudent and cautious man, he would with reference to his own property, they should hold him liable.

Judgment affirmed.

Bosworth & Allen v. Farenholz.

An action to recover the possession of certain real estate. Both parties claim title under H. F., who received a conveyance from H. B. H. B. on the 18th of June, 1851, and before he conveyed to H. F., mortgaged the premises to A. Y., to secure the payment of $50. On the 22d of October, 1852, A. Y. commenced suit in the Scott District Court, to foreclose the mortgage, making H. B. and wife and H. F. parties, under a decree in which, the premises were sold and conveyed by the sheriff to W., who conveyed to A. & V., who conveyed to B. & A., the plaintiffs. On the 25th of September, 1851, H. F. mortgaged the premises to W. F., reserving the right to borrow $300, and to mortgage the same premises to secure the payment of the same, which last mortgage was to take precedence of the mortgage to W. F. On the 24th of October, 1851, H. F. mortgaged the premises to H. Y., to secure the payment of $215, which mortgage was paid and canceled on the 8th of May, 1852, at which time H. F. borrowed $250 of D. S., and conveyed the premises to C. as trustee, to secure the payment of the same, authorizing C. in default of payment, to advertise and sell the property on twenty days' notice, and convey the same to the purchaser. The money was loaned by S. to H. F. on the strength of the reservation in the mortgage to W. F. The money not being paid, C. the trustee, on the 20th of June, 1853, sold and conveyed the premises to B., who conveyed to W., the grantor of the plaintiffs. On the 19th of May, 1852, H. F. by deed, conveyed to the defendant a portion of the premises, described in the deed as follows: "forty feet of lot two, in block forty-two, in Davenport." The defendant was in possession of the mortgage from H. F. to W. F., dated September 25,

1851, but she did not show that it had been assigned to her, or that she had any interest in it.

Held, 1. That neither the defendant nor W. F. were in a position to object to the plaintiff's title and right to recover the premises, on the ground that neither of them were made parties to the suit brought by A. Y. to foreclose the mortgage executed by H. B.

2. That the deed from H. F. to the defendant, was void, for uncertainty in the description.

3. That the deed of trust to C. was good as a conveyance of H. F.'s interest in the premises, at the date of the deed; that the objections made to it, if tenable, could only have the effect to postpone the title acquired under it, to any that might have been acquired under the mortgage to W. F.; and that the deed of trust being older than that of defendant, the plaintiff's title under it, was superior to that of defendant.

Appeal from the Scott District Court.

THIS was an action to recover the possession of the west half of lot 2, in block 2, in Davenport. Both parties claim title under Henry Farenholz, who received a conveyance of the premises from Henry Bliss. Bliss, on the 18th of June, 1851, before he conveyed to Henry Farenholz, mortgaged the premises to Antoine Yeager, to secure the payment of fifty dollars. On the 22d of October, 1852, Yeager commenced suit in the Scott District Court, to foreclose the mortgage, making Bliss and wife and Henry Farenholz, parties. A decree of foreclosure and sale being rendered, the premises were sold and conveyed by the sheriff to C. C. Webber, who conveyed to Arnot & Veiths, who conveyed to plaintiffs. On the 25th of September, 1851, Henry Farenholz mortgaged the premises to Wm. Farenholz, reserving the right to borrow $300, and to mortgage the same premises to secure the payment of the same, which last mortgage was to take precedence of the mortgage to Wm. Farenholz. On the 24th of October, 1851, Henry Farenholz mortgaged the premises to Henry Yeager, to secure the payment of $215; this last mortgage was paid and canceled on the 8th of May, 1852; at which date, Henry Farenholz borrowed of David Sullivan, $250, and conveyed the premises to John P. Cook, as trustee, to secure the payment of the same, authorizing Cook, in default of payment, to ad-

vertise and sell the property on twenty days' notice, and convey the same to the purchasers. It was shown by the plaintiff, that the money was loaned by Sullivan to Farenholz, "on the strength of the exception in the mortgage from Henry to Wm. Farenholz." The money not being paid according to the tenor and effect of the promissory note to Sullivan, J. P. Cook, the trustee, on the 20th day of June, 1853, sold and conveyed the premises to Barrows, who conveyed to Webber, the grantor of plaintiff.

The defendant offered in evidence, the record of the mortgage from Henry Farenholz to Wm. Farenholz, dated September 25th, 1851. There was not shown any assignment of the mortgage to defendant, nor that she had any interest in it, except the possession of the mortgage. Defendant also gave in evidence a deed of conveyance from Henry Farenholz to defendant, dated May 19th, 1852, for "forty feet of lot No. 2, in block No. 2, in Davenport." The cause was tried by the court, with leave to either party to except to the decision. The court gave judgment for the plaintiff for the possession of the premises. The defendant excepted to the decision of the court, for the following reasons:

1. Because William Farenholz was not made a party to the proceedings in foreclosure of Yeager against Bliss and others.

2. Because defendant was not made party to said proceedings.

3. Because the power reserved to Henry Farenholz in the mortgage to William Farenholz, had been exhausted by the mortgage to Henry Yeager, and no new mortgage could be given to take precedence of that given to William.

4. Because a power to mortgage, is not a power to give a deed of trust, and no deed of trust, or sale under it, would confer such a title as to enable the plaintiff to recover the possession of defendant.

5. Because the deed of trust to John P. Cook, does not refer to the power, nor does it anywhere appear, that the same was made in execution of the power named in the

mortgage from Henry to William Farenholz, and parol testimony cannot be given to prove it.

The court overruled the exceptions, and defendant appeals.

Whitaker & Grant, for the appellant.

Cook & Dillon, for the appellee.

STOCKTON, J.—It is urged by defendant, as a fatal objection to plaintiff's title and right to recover against her, that neither William Farenholz nor defendant, were made parties to the suit, brought by Yeager to foreclose the mortgage given by Bliss, June 18th, 1851. We do not see that the defendant is in a position to make this objection for William Farenholz. She does not connect herself in any manner with him, nor show any right to answer for him, except that she has in her possession the mortgage given by Henry to William Farenholz, September 25, 1851. If by the production of this mortgage, it was intended to show an outstanding title in William Farenholz, in order to defeat plaintiff's right to recover, it is well settled that such outstanding title, must be a legal title, better than the plaintiff's. In this instance, it will not be contended, that William Farenholz has any but an equitable title, if he had even that, after the proceedings in foreclosure.

We are quite as far from being satisfied, that the defendant is in any better position than William Farenholz; or that she can be permitted to object that she was not made a party to the foreclosure suit. She claims under a deed of conveyance from Henry Farenholz, which purports to convey to her forty feet of lot No. 2, in block No. 2, in Davenport. Does this give her any title to the premises in controversy? We think not. The description is fatally defective, and does not convey to her any interest. In *Worthington* v. *Hilyer*, 4 Mass. 205, PARSONS, C. J., says: "If the description in a conveyance be so uncertain, that it cannot be known what estate was intended, the conveyance

is void." See also, *Gault* v. *Woodbridge*, 4 McLean, 329; *Porkendorf* v. *Taylor's Lessee*, 4 Peters, 349; *Haven* v. *Crane*, 1 N. H. 93; *Ward* v. *Bartholomew*, 6 Pick. 409; but if this deed was sufficient, and defendant could take under it all the interest of Henry Farenholz at the date, it must be remembered that plaintiff derives title by virtue of the deed of trust to J. P. Cook, of older date than defendant's conveyance from Henry Farenholz. The objections made to the deed of trust to Cook, are altogether to the operation of the deed, as a valid execution of the power reserved in the mortgage to William Farenholz. The objections, if tenable, can only have the effect to postpone the title acquired under it, to any that might be acquired under the mortgage to William Farenholz, in which the power is reserved. It is still good as a conveyance of Henry Farenholz's interest in the premises at the date of the deed, and being of an older date than the defendant's deed, the plaintiff's title under it, is superior to that of defendant.

It is, therefore, unnecessary for us to notice the other questions raised by defendant. The plaintiff, in our judgment, has shown a valid subsisting interest in the premises in dispute, and a right to the immediate possession. The defendant is in possession without title, and her possession must yield to the superior right of plaintiffs.

Judgment affirmed.

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DOUGHERTY *v.* POSEGATE.

Where in an action for money alleged to have been found by the defendant, a witness called by the plaintiff, testified that the defendant came to his office, and informed him that he had found money over one of the windows of a certain house; that the witness suggested to call in the prosecuting attorney of the county, and advise with him; that this was done, and they advised defendant to bring the money to the office, and that it should be marked; that defendant got the money, and they marked it; that defendant took it away with him; and that defendant was to put it in the same place

where he found it; and where on cross-examination, the defendant asked the witness to state, what the defendant had stated in other conversations, about his putting the money back in the same place, and whether he watched the same or not, to which question the plaintiff objected, which objection was sustained by the court, and the testimony excluded; *Held*, That the evidence did not tend to explain the previous testimony of the witness, and was not admissible under section 2399 of the Code.

The *other* act or declaration of a party, contemplated by section 2399 of the Code, to be admissible in evidence, must be something which is necessary to make the previous or subsequent detached act or declaration fully *understood*, or to explain it.

It is not all that the party may have said at other times, with regard to the subject of the suit, or the matter in controversy, that is admissible in evidence, under section 2399 of the Code.

Where in action to recover money of the plaintiff, alleged to have been lost by the negligence of the defendant, the court instructed the jury, on its own motion, as follows: "That only slight diligence was required of the defendant in the care of the money, and that he was answerable for gross negligence only;" and where the defendant asked the court to instruct the jury as follows: "That if they find that the defendant knew that the money found by him belonged to the plaintiff, he could recover nothing for the finding, except it was voluntarily given to him by the plaintiff; and that he was an unpaid bailee, and only responsible for gross negligence," which the court refused to give; *Held*, That the two propositions being legally identical, the second was unnecessary; and that the instruction asked by defendant, being based upon an hypothesis upon which it does not appear that there was any evidence, was properly refused.

The word "carelessness" is not a legal term, but it must be taken as equivalent to negligence.

And where in such an action, the court instructed the jury as follows: "That if defendant found the plaintiff's money, knowing the same to be the plaintiff's, he was bound to make restitution of the same, without compensation:" *Held*, That this instruction is in accordance with the act to provide for the taking up of water crafts found adrift, lost goods, and estray animals, approved January 24, 1852, and was correct.

Appeal from the Warren District Court.

THIS action was instituted by Dougherty before a justice of the peace, against Posegate, to recover a certain sum of money, alleged to have been lost by the negligence of the defendant, and taken by appeal to the District Court, where judgment was rendered for the plaintiff. The defendant appeals. The facts of the case and the errors assigned, are fully stated in the opinion of the court.

Clarke & Henley, for the appellant.

P. Gad Bryan, for the appellee.

WOODWARD, J.—The plaintiff claims of defendant $92.50, and alleges, that he lost money to the amount of $199.50; that defendant found the same, wholly disregarded the law concerning lost goods, money, &c., and so carelessly and negligently dealt with, and managed said money, that $92.50 thereof were totally lost, and have never been paid to plaintiff. The defendant takes issue on all the allegations of the petition. On the trial, one Henderson, a witness called by the plaintiff, testified that about the 19th of December, 1854, the defendant came to his office, and informed him, that he (defendant) had found money over one of the windows of a certain house. Witness suggested to call in the prosecuting attorney of the county, and advise with him. This was done. They then advised defendant to bring the money to the office, and that it should be marked. Defendant got the money, and they marked it, and defendant took it away with him, and was to put it in the same place where he found it. This is all the evidence shown in the case. On cross-examination, the defendant's counsel asked the witness to state what Posegate had said, in other conversations, about his putting the money back in the same place, and whether he watched the same or not. To which question the plaintiff objected, and the court sustained the objection.

This is the foundation of the first assignment of errors. This testimony is claimed to be admissible under section 2399 of the Code, the concluding clause of which provides, that "when a detached act, declaration, conversation, or writing, is given in evidence, any other act, declaration, or writing, which is necessary to make it fully understood, or to explain the same, may also be given in evidence." While we fully appreciate the wisdom of this provision, a majority of the court, at least, cannot deem it applicable, in the case at bar; and conclude, therefore, that the testimony

was properly rejected. The other act or declaration, contemplated by the Code, must be something which is necessary to make the previous or subsequent detached act or declaration, fully understood, or to explain it. It is not all that the party may have said, at other times, with regard to the subject of the suit, or the matter in controversy. Now, in this case, there is no positive evidence that Posegate, at any time, said a word, or at least, no declaration is proven. He was to do an act, however, and this was to place the money where he found it. It is then proposed to prove what he said in other conversations about putting the money back, and whether he watched it. How does this explain what he was to do, or make more fully understood what he had previously said, or undertaken to do, with the money? It would not seem to assist in throwing light on these things, but it seems rather an effort to prove something new—to establish something which he thinks may tend to his exculpation, but which did not exist, and could not have been in existence, at the time of undertaking the other act. If this were allowed, it would afford a convenient method for a party to make testimony for himself; for he could promise to do a thing, and then afterwards say he had done it, and thus prove its performance. This was not contemplated by the Code. This is the substance of the reasoning on the one side, and its force is appreciated; whilst on the other, it is feared that this is giving too narrow a sense to the statute, and standing too much upon the mere word; and it is thought that the matter in question might fairly stand, perhaps, with the sense of the first clause of the same section. However, the foregoing are the views of the majority, and the writer yields a doubting assent.

The other supposed errors rest upon the instructions. The court, on its own motion, instructed the jury that only slight diligence was required of the defendant in the care of the money; and that he was answerable for gross negligence only. The defendant asked the same charge, but it was coupled with qualifications, or with other ideas, rendering it, at least, more obscure. The court refused to give it. If the

two propositions are legally identical, the second was unnecessary, and we should not reverse the cause for its refusal. But that of defendant is based upon a hypothesis, viz: that defendant knew it was plaintiff's money—upon which it does not appear to this court, that there was the least testimony. The proposition given by the court, therefore, was the one which was called for by the case, and is equally in defendant's favor with that asked by him, whilst defendant's was inadmissible, so far as we can perceive from the record.

Objection is also made by defendant, to the first and second instructions given at the request of the plaintiff. The first is, that if the defendant found the plaintiff's money, and by carelessness the same, or any part thereof, is lost by defendant, he is liable for the portion lost. It is true that the word "carelessness," is not a legal term; but it must be taken as equivalent to negligence, from which it does not greatly differ in ordinary acceptation. As to the degree of this necessary to charge the defendant, the court explicitly instructed the jury, as we have seen above.

The second instruction is, that if defendant found plaintiff's money, knowing the same to be plaintiff's, he was bound to make restitution of the same, without compensation. This is the provision of the act, and is correct. See Statute of 1852–3, 166. The idea of this instruction is not, that he is bound to make restitution at all events; but it is, that he shall do it without compensation; that is, he cannot make and recover a charge. The objection to this instruction is rather airy, and we are not sure that we perceive its point. But if it be not the above, then it is that the court did not instruct that defendant might take compensation, if given voluntarily. If this be it, we hardly think it required an instruction below, or the attention of this court. These are all the points presented to the court, and there is no error in them.

Judgment affirmed.

MERCHANTS AND MECHANICS' BANK OF CHICAGO *v.* HEWITT.

A receipt in the words and figures following: "1,000 bushels corn. Leclaire, Iowa, June 30th, 1854. Received in store, on account of S. F. Atwood, of Chicago, Illinois, one thousand bushels of good, sound, merchantable shelled corn, to be delivered to his order to the steamboat landing at Leclaire, in gunny sacks, in good order, free of charges. Risk of fire excepted. W. H. Hewitt," is not a negotiable instrument under the laws of this state.

Section 949 of the Code has altered the common law rule, so far as to authorize a suit to be brought upon an unnegotiable instrument in the name of the assignee.

The use of the term "to be delivered to his order," in such an instrument, does not manifest an intention on the part of the maker, to make it negotiable.

Although the instrument, under section 949 of the Code, is assignable by indorsement, and the assignee may sue on it in his own name; yet it is subject to any defence or set-off, legal or equitable, which the maker had against the assignor, before notice of the assignment.

In order to constitute a valid assignment of an unnegotiable instrument of writing, notice must be given to the maker.

Where in an action on an unnegotiable instrument, brought in the name of the assignee, against the maker, the defendant answered, denying all the material averments of the petition, and averred further, that before defendant had any notice of the assignment of the receipt to the plaintiff, the assignor was, and still is, indebted to him in a certain sum, for the corn in the receipt mentioned; that he had no notice of the transfer of the receipt to plaintiff, until the commencement of the suit; that the assignor at the date of the receipt, purchased the corn of defendant, and accepted a draft for the price of the same; and that the draft was protested and never paid; and also claimed the right to retain the corn, until the price of the same was paid; and where, to so much of the answer as set up new matter, the plaintiff demurred, and the demurrer was sustained by the court; *Held*, That the receipt not being negotiable, the plaintiff stood in no better position than the assignor would have stood, had the suit been brought in his name, and that the demurrer was improperly sustained.

Where in an action on an unnegotiable instrument, brought in the name of the assignee, the defendant offered to prove, that his defence to the action as set up in his answer, existed before he had notice of the indorsement of the receipt to plaintiff, and before it was in fact indorsed, which evidence was objected to, and the objection sustained; *Held*, That the evidence should have been admitted.

Appeal from the Scott District Court.

THIS is an action by plaintiff, as assignee of the following receipt, to recover of defendant the value of the corn therein mentioned:

"1,000 bushels corn. LECLAIRE, Iowa, June 30th, 1854.

"Received in store, on account of S. F. Atwood, of Chicago, Illinois, one thousand bushels of good, sound, merchantable shelled corn, to be delivered to his order, to the steamboat landing at Leclaire, in gunny sacks, in good order, free of charges. Risk of fire excepted.

W. H. HEWITT."

This receipt was assigned to plaintiff on or about the 27th July, 1854. Some time between the 8th and 15th October, 1854, the plaintiff demanded of defendant the corn mentioned in the receipt, which defendant refused to deliver. The receipt was taken by plaintiff, in good faith, in the ordinary course of business, and for a good consideration.

The answer of defendant avers, that before he had any notice of the assignment of the receipt to plaintiff, Atwood was, and still is indebted to defendant in the sum of $450, for the corn in the receipt mentioned, and that he had no notice of the transfer of the receipt to plaintiff, until the commencement of the suit. The answer further avers, that Atwood at the date of the receipt, purchased the corn of the defendant, and accepted a draft for the price of the same; and that the draft was protested and never paid; and defendant claims to retain the corn, until the price of the same is paid to him. To this answer, the plaintiff demurred, and the court sustained the demurrer. There was a general denial of plaintiff's right to recover, and of the facts stated in his petition. Defendant offered no evidence to show that the plaintiff had notice of the facts relied on as a defence to the action, at or before the time plaintiff purchased the receipt of Atwood, but offered to prove that his defence to plaintiff's action, as set up in his answer, existed before

he had notice of the indorsement of the receipt to plaintiff, and before it was in fact indorsed. The plaintiff objected to the evidence, and the court sustained the objection, and defendant excepted. There was judgment for the plaintiff, and defendant appeals.

Whitaker & Grant, for the appellant.

The general principle, that the corn receipt was not assignable, even in equity, so as to bar any defence or set-off which the defendant had, prior to notice to him of the assignment, will not, probably, be denied. This warehouse receipt could not be assigned at common law; it is assignable in equity. 2 Story's Equity Juris. § 1040. Subject to all the equities between the parties, before, and at the time when, the debtor has notice of the assignment. Section 1040. And to perfect the assignee's title, he should immediately give notice of the assignment to the debtor, for, otherwise, a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by payment to the assignor, before such notice. 2 Story's Equity Juris. § 1047. Must give debtor notice. Section 1057. Since, until such notice, he is not affected by the trust created by the assignment. "The debtor may, in such case, make all the defences which he might have made, if the suit were for the benefit of the assignor, as well as in his name, provided those defences rest upon honest transactions, which existed between the debtor and the assignor, before the assignment, or after the assignment and before the debtor had notice or knowledge of it." 1 Parsons, 196. The modern English decisions have settled, that in order to constitute a valid assignment of a debt of this kind, notice must be given to the debtor. And if, without such notice, he should pay it to the creditor, he will be protected in it; or if, after an assignment, another, in good faith, should obtain a second assignment, and first give notice of his equity, he will be preferred to the first assignee. The amount of the doctrine is, that the bare assignment of such a *chose in action*, does not pass it away, without notice of the fact to the debtor, who thereby is informed of

the real holder of the debt. *Richards* v. *Griggs*, 16 Missouri, 418; 3 Russell, 1.

The evidence shows, that the draft for the payment of the corn, was protested and returned to Hewitt, and his right to retain the corn as against Atwood, before Atwood had assigned it to the bank. It is true, we cannot show this point on the demurrer, but the plea is, that the draft was protested, and the right of set-off accrued, before the defendant had notice of the assignment. And, as we wish to present the whole case here, we will argue it on the facts as proved. Then, by the general principles of law, Hewitt would have the right to make the same defence against the plaintiffs, as he would have against Atwood. As against Atwood, the defence is a good one. Now, has our Code modified this principle? We think not, but that this principle is expressly recognized. Section 949 says: "Instruments in writing, by which the maker promises to deliver property, are assignable, by indorsement thereon, or by other writing; and the assignee shall have a right of action in his own name, subject to any defence or set-off, legal or equitable, which the maker or debtor has against the assignor, before notice of his assignment." Section 950 provides, "that instruments, by which the maker promises to deliver property, are negotiable instruments, where it is manifest from their terms, that such was the intent of the maker; but the use of the technical words, 'order or bearer,' alone, will not manifest such intent." This instrument is not, under the Code, a negotiable instrument, because there are no terms in the instrument showing the intent of the maker, or that make it manifest, except the technical word, "order," which the Code says will not manifest such intent.

2. Again: this corn receipt merely gave the holder the right to demand of the receipter, the delivery of the corn. *Gardiner* v. *Suydam*, 3 Selden, 357. And, as Hewitt was the vendor of the chattel, he had a right to detain it for the price. If the property be sold for cash, and the price be not paid, or, if it be sold on a credit, and remain in the hands of the vendor, the vendor has a lien on it for the price. 1 Parsons'

Contract, 440. In every sale, unless otherwise expressed, there is an implied condition, that the price shall be paid before the buyer has a right to the possession; and this is a condition precedent. 1 Parsons' Contract, 448. The decision below takes from the defendant his property, without his being paid for it, and there must be some strong rule of equity in favor of some one else, which will justify such a decision.

Cook & Dillon, for the appellee.

The material question presented by the record in this case, and the one into which all others resolve themselves, is this: Was the defendant entitled to set up the equities existing between him and Atwood, as a defence to plaintiff's action, he being admitted to be a *bona fide* holder for value, without notice? The discussion of this question, and of the arguments pressed by the counsel for the appellant, necessarily involves a consideration: 1. Of the legal nature and properties of the instrument declared on; 2. Of the general rules of law, aside from the statute, respecting such instruments; 3. The construction of the statute, and particularly of sections 949 and 950, of the Code; and 4. The nature of the defendant's defence, which was held insufficient by the court below, as against the plaintiff.

1. The corn receipt sued on, is one of the ordinary negotiable warehouse receipts, so common in all commercial places. The one in question, states on its face, that the defendant has received for S. F. Atwood, 1,000 bushels of corn, in his store or warehouse; and the defendant agrees to deliver this corn to the order of Atwood, free of all charges, risk of fire excepted. By fair, and almost necessary implication, it appears: 1. That the corn so received was Atwood's; 2. That the defendant received it for him, as a warehouseman; and 3. Agreed to deliver it, not to Atwood, but to his order, expressly making the instrument negotiable.(1) If this instrument is not transferable, ingenuity

(1) As to the nature of a warehouse receipt, and the position of warehousemen, see *Suydam, Sage & Co.* v. *Watts*, 4 McLean, 162.

may well be challenged to frame one, that would be so considered. No stronger words or language, indicating an intention that the paper should have a negotiable quality, could well have been used; and its negotiability is entirely consistent with the whole transaction, as stated in the warehouse receipt. The defendant having received in his storehouse, 1,000 bushels of Atwood's corn, it does not matter to him, to whom he shall deliver it, and he undertakes to deliver to the order of Atwood, *i. e.* to the holder of the receipt. It was not intended that no person but Atwood, could demand the corn, or that Atwood should not have the power of transferring the corn, by transferring the evidence of his title to it. Such a construction of these mercantile instruments, would greatly embarrass commercial transactions, and would be directly contrary to the constant usage and practice of merchants.

2. The transferable quality of this instrument, will appear still further, by a recurrence to some general rules of law upon analogous subjects. Some light will be thrown upon this subject by adjudications which have been made upon the rights of parties to bills of lading. "The usual words in a bill of lading, ('To be delivered, &c., unto ——, his order, or assigns,') binding the master to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person, enables the person so named, or his assignee, to demand the goods." Flanders on Shipping, § 483. Bills of lading are indorsable by the consignee, and his indorsement to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interest, passes the property in the goods, against all the world. See *Conrad* v. *Ins. Co.*, 1 Peters, 386; *Nathan* v. *Giles*, 5 Taunt. 558; Flanders on Shipping, § 595. And such transfer of a bill of lading, defeats the vendor's right of stoppage *in transitu*, and transfers the property in the goods. Flanders on Shipping, § 595; see the leading case of *Lickbarrow* v. *Mason*, 1 Smith L. Cases, 388, and particularly the opinion of ASHHURST, J., 396, and BULLER, J., 397. The reasoning of these judges,

applies very forcibly to the questions raised in the case at bar. *Chandler et al.* v. *Sprague*, 5 Metcalf, 308. "Where a man, by his own act, gives a negotiable quality to paper, and suffers it to go into the market, with this transferable quality about it, it does not lie in his mouth to deny the effect of his own words," &c. *Jarvis* v. *Rogers*, 13 Mass. 105; 15 Ib. 389; *Collins* v. *Martin*, 1 B. & P. 143.

Another familiar principle of law, would appear to apply with peculiar force, to this case, that is: "that where one of two innocent persons must suffer by the fraud of a third person, the loss ought to fall on him who reposed confidence, and enabled the party to practice the fraud." Paley on Agency, 201; Story on Agency, § 56, and cases cited. This sound rule of law is often cited, where it is not applicable; but we submit that it does apply to this case, admitting it to stand as stated in the defendant's answer. This principle was applied "as a strong and leading clue to the decision" of *Lickbarrow* v. *Mason*, by J. ASHHURST, 1 Smith's L. C. 396, and by the court, in the decision of *Jarvis, Adm.* v. *Rogers*, 15 Mass. 403.

3. The plaintiff claims that the instrument sued on, falls within the provisions of section 950 of the Code; the defendant claims that section 949 of the Code governs. Section 949 expressly provides for instruments "without words of negotiability," making them assignable by indorsement, or other writing, and giving, subject to a right of set-off in certain cases, a right of action to the assignee, in his own name. Now, as the instrument declared on, does contain express "words of negotiability," it is obvious that it does not come within the class of cases contemplated by section 949. Section 950 makes such instruments as the one sued on, "negotiable, with all the incidents of negotiability, whenever it is manifest from their terms, that such was the intent of the maker, but the use of the technical words 'order' or 'bearer' alone, will not manifest such intent." This section evidently provides for a different class of instruments than that contemplated by section 949. The one refers to instruments "without words of negotiability;" the other, section

950, to "negotiable instruments, with all of the incidents of negotiability." By section 950, there may be instruments for the "delivery of property" (and such is the one sued on), which are "negotiable, with all the incidents of negotiability," which "incidents" are mainly: 1. The right of an assignee to sue in his own name. 2. His protection, except in certain cases, from any equities between the original parties. We repeat, that if the instrument declared on, be not negotiable by the express terms thereof, we do not see how it could well be made so.

4. The doctrine of vendor's lien has no application to this case, because: 1. To allow this to be set up against a *bona fide* assignee, would be to contradict the terms of the receipt, which, by fair construction, states that the defendant has received the corn of Atwood, in store for him, and agrees to deliver it to his order. 2. A court of law will not take notice of the equitable lien of the vendor, nor assert such rights against a *bona fide* assignee, than whom no party can have superior rights or equities. 3. A fair construction of section 950 of the Code, cuts off any such right as is asserted here. The law of Iowa, where the instrument was made, and the suit pending, governs the rights of the parties, and not the laws of Illinois. If Hewitt had made advances on this receipt, he would probably have done as the plaintiff did, secured himself by obtaining possession of the instrument, which would have prevented any subsequent negotiation of the same.

As to the defence set up, it is nothing more or less than an attempt to set off as against the plaintiff, a debt which the defendant claims is due to him from Atwood, the assignor of the plaintiff, viz: the amount of a protested draft drawn by Atwood in favor of the defendant. The answer does not allege notice to the plaintiff. The fact that Atwood bought the corn of the defendant, does not alter the nature of the defendant's claim. He could set up, in defence, any other claim against Atwood, on the same principle that he offers, as a set-off, this protested bill. Claiming to be *bona fide* assignees, and (in the language of the bill of exceptions),

having taken "said corn receipt in good faith, in the ordinary course of business, and for a valuable consideration," the plaintiffs maintain that the defence is insufficient, without an allegation of notice.

STOCKTON, J.—The important and material question involved in this cause is, whether the receipt sued on is a negotiable instrument, under the laws of this state, and whether the defendant should have been permitted by the court, to make the same defence to it, in the hands of the assignee, that he might have made to a suit brought upon it by the original obligee. Such a receipt was not assignable at common law, so as to authorize suit upon it in the name of the assignee. Our statute (Code, § 949) has altered the common law rule, so far as to allow such a suit. Independent of this provision of the statute, unless Hewitt had assented to the assignment, suit must have been brought in the name of Atwood, for the use of the assignee. Such an action would have been open to all the equitable defences which Hewitt might have made, had the suit been for the benefit of Atwood, as well as in his name, provided those defences rest in honest transactions, which took place between Hewitt and Atwood before the assignment, or after the assignment and before Hewitt had notice or knowledge of it. Parsons on Contracts, 196.

It is claimed by plaintiff, that the receipt is negotiable, under section 950 of the Code; that the corn being deliverable to the "order" of Atwood, the receipt has all the incidents of negotiability. We cannot coincide in this opinion. Such instruments may undoubtedly be made negotiable by agreement of parties, but they are only so under the statute, "whenever it is manifest from their terms, that such was the intent of the maker; but the use of the technical terms, "or order," or "bearer," will not manifest such intent." The corn, in this case, was to be delivered to the "order" of Atwood. These words, however, unaccompanied with any other evidence of an intent to make the receipt negotiable, are not sufficient to give it the character and incidents of ne-

gotiability. Our conclusion is, that as it is not manifest from the terms of the receipt, that it was the intention of Hewitt to make it negotiable, although under section 949 of the Code, it is assignable by indorsement, and the assignee may sue on it in his own name, yet it is subject to any defence or set-off, legal or equitable, which Hewitt had against Atwood before notice of the assignment. In order to constitute a valid assignment of an instrument of writing like the present, notice must be given to the maker. If without such notice, the maker deliver the property to the assignor, he will be discharged. And if after assignment, another person obtain a second assignment, and first give notice of his equity, he will be preferred to the first assignee. Parsons on Contracts, 196; *Richards* v. *Griggs*, 16 Missouri, 418; *Dearle* v. *Hall*, 3 Russell Ch. 1; 2 Story's Eq. Jurisprudence, §§ 1047, 1057.

The defendant avers in his answer, that until the commencement of the suit, he had no notice of the assignment of the receipt to plaintiff; and before he received such notice, Atwood was, and still is, indebted to defendant, in the sum of four hundred and fifty dollars, for the price of the corn; that he has never received payment from said Atwood nor any other person; and that the corn is still in his possession, where it had been since the execution of the receipt, and he claims the right to retain it, until he is paid the price of the same. To this answer, a demurrer was sustained. If it is permitted to Hewitt, to make the same defence to the action by the assignee to recover the value of the corn, that he might have made to a suit on the receipt by Atwood, we cannot resist the conclusion, that the demurrer was improperly sustained. The receipt not being negotiable, the plaintiff stands in no better position than Atwood would have stood in, if he had sued Hewitt on the receipt. In such an action, then, would Hewitt's answer have been a good defence? It will be remembered, that there had been no delivery of the corn. It still remains in the warehouse of Hewitt. Atwood had accepted a draft for the price of the corn, which was protested; and never

paid. If property is sold for cash, and the price be not paid; or if it be sold on a credit, and remain in the hands of the vendor, the vendor has a lien on it for the price; and only payment or tender, gives the vendee a right to possession. 1 Parsons on Contract, 440. Demand on Hewitt for the corn was not made until October; and as Atwood had not, in the meantime, paid the price of it to Hewitt, and the corn had all the time remained in his possession, Hewitt was entitled to retain the corn until he was paid for it, according to agreement. This answer, then, would have been good in a suit by Atwood against Hewitt, and is equally good in any suit by Atwood's assignee. We conclude, therefore, that the demurrer to the answer was improperly sustained, and the evidence offered by defendant should have been received.

We have carefully considered the arguments of plaintiffs' counsel, based upon the analogy between this receipt, and an ordinary bill of lading. We see no good reason to change our views of the subject presented above. A bill of lading is the contract of the master of a vessel, to deliver the property to the person to whom the consignor or shipper shall order the delivery. It is transferable by indorsement, and the property passes to the assignee. This is the result of well settled principles of the commercial law. The doctrine predicated of bills of lading, by the defendant's counsel, is undoubtedly correct in all questions arising between the consignor or shipper, and the consignee or his assignees. But in an action against the master of a vessel, or obligor in the bill of lading, for the non-delivery of the goods, other principles must govern, and the right of the parties must be regulated by the Code; and we are unable to give its provisions any other interpretation than such as will allow to the maker of the corn receipt, every legal and equitable defence in a suit by the assignee, which he might make in a suit, in the name of the original payee.

Judgment reversed.

CLARK *v.* SEARS.

Where in a suit to enforce the specific performance of a contract to convey real estate, in which contract the complainant was to perform labor, as well as to pay money, it appeared that he had performed the work, and paid part of the money according to the agreement; that he was prevented from paying the balance of the money on the day it became due, by the absence of the respondent; and that he had tendered the money due, with the accruing interest, when respondent refused to receive the money, and convey the land, on the ground that the day of payment had passed by; *Held*, That the complainant had shown himself sufficiently prompt to perform his part of the contract, and was entitled to a specific performance of the contract.

Appeal from the Jackson District Court.

THIS was a petition in chancery, to enforce the specific execution of an agreement to convey certain real estate, and to enjoin proceedings at law, to recover the possession of the same, begun by defendant. The petition alleges that defendant, having the legal title, on the 1st day of January, 1853, sold the land to one Parsons, reserving the fence; that Parsons, in consideration thereof, was to make a division fence between him and defendant, and was to pay him fifty dollars, January 1st, 1854, and fifty dollars, January 1st, 1855, with interest; and if the stipulations on the part of Parsons, were not complied with by him, the agreement was to be null and void; that Parsons took possession of the land, and made improvements thereon, alleged to be worth $250; that before completing the same, he abandoned the land, and left the country, indebted to plaintiff, at the time, in the sum of $75, for money and materials used in making the improvements; that about August 1st, 1853, defendant proposed to plaintiff, to compensate him for the money and materials aforesaid, by executing to complainant the written agreement drawn up to be executed to Parsons, and which had never been delivered to him, provided plaintiff would pay defendant the amount that Parsons was to pay for the land, and the additional sum of thirty dollars; which

plaintiff agreed to, and gave defendant his note for the thirty dollars; that defendant thereupon, with a pencil, erased the name of Parsons from the written agreement, and inserted the name of plaintiff, and added a clause to said agreement, extending the time for making the outside fence, to January 1st, 1854, provided defendant's stock might run on the premises; that this writing, thus executed, was delivered to plaintiff, who took possession of the land, and went on to make further improvements, expending some fifty dollars therein; that plaintiff paid defendant the thirty dollars, for which he had given his note, and on the first day of January, 1854, called at defendant's place of business, to pay the sum of fifty dollars then due, but defendant could not be found; at which time plaintiff was ready with the money to pay the fifty dollars and interest; and that at several subsequent times, he called at his place of business, but could not find defendant; that the first time the plaintiff met the defendant after the first of January, which was some time in said month, he offered to pay him the money and interest, and tendered the same, but defendant refused to receive it, alleging that payment should have been made on the 1st day of January, and plaintiff by delay, had forfeited his contract, and defendant meant to take advantage of it. Plaintiff alleges that he subsequently offered, several times, to pay defendant the fifty dollars and interest, but defendant refused to take it; and in May, 1854, plaintiff tendered to defendant the full amount to be paid by plaintiff on the said written agreement for the land, with interest to January 1st, 1855, and demanded a deed of conveyance, which defendant refused to accept, and refused to make the deed. Plaintiff brings the money into court, and prays the specific execution of the contract, alleging the full and complete performance of the contract on his part, and the refusal of defendant to convey.

The answer of defendant admits the agreement as stated by plaintiff, and relies as a defence, upon the fact that plaintiff did not make the fence as agreed upon, and did not make payment upon the first of January, as required by the

agreement. The proof shows that plaintiff had made the fence in April or May, 1854, according to the agreement; that some two or three weeks after the 1st day of January, 1854, he tendered defendant the amount of money and interest due on the 1st day of January, 1854; that defendant refused, on the ground that the time was past when the money should have been paid; that some three weeks afterward, plaintiff tendered the money again, and it was again refused by defendant, who alleged that the time of payment had passed some five or six weeks; that plaintiff then told defendant, that he had been to see him once or twice before, to pay the money, but could not find him; and that this statement defendant did not deny. It is also proved that some short time afterwards, plaintiff tendered the defendant the amount of money and interest due on the agreement, up to January, 1855, when the last payment was due, and demanded a deed of conveyance, which defendant refused. The District Court rendered judgment in favor of plaintiff, from which defendant appeals.

W. E. Leffingwell, for the appellant.

Smith, McKinlay & Poor, for the appellee.

STOCKTON, J.—The judgment in this case must be affirmed. It is unnecessary for us to discuss at any length either the facts or the law, as applicable thereto. It will be sufficient to remark, that plaintiff is shown by the evidence, to have been ready to pay the installment of the purchase money, due on the 1st of January, 1854; that he sought the defendant at his usual place of business, on or about that day, in order to pay him, and did not find him; and that on several days between the first and fifteenth of the month, he was ready and anxious to pay the money, and when he tendered it, about two weeks after the first, defendant refused to receive it, on the ground that the tender was not in due time, and he intended to take advantage of it. Plaintiff then told defendant that he had been ready all the time to pay the

money, and had tried to find the defendant and could not. This is not denied by defendant, and the evidence of the son of defendant shows, that plaintiff called several times and inquired for defendant, and he could not be found. We think the plaintiff has shown himself sufficiently prompt to perform his part of the contract, and to pay the money; and he is entitled to a specific performance of the contract.

The decree of the District Court is affirmed.

MAHNKE *v.* DAMON & CO. *et al.*

In an action on an attachment bond, it is not sufficient to allege generally in the petition, a wrongful suing out of the attachment, or that there was no cause for suing out such writ.

In such an action, the petition must aver that the defendant had no sufficient cause for *believing* the allegations of the affidavit or petition, on which the attachment issued.

Appeal from the Scott District Court.

THIS is an action on an attachment bond. The affidavit on which the attachment issued, alleged, that on the *belief* of the affiant, the defendants in the attachment suit, were about to dispose of their property, without leaving sufficient remaining for the payment of their debts; that defendants had property, goods and money not exempt from execution, which they refuse to give, either in payment or security of said debt; and that said defendants were, by selling fraudulently to third parties, about to dispose of their property, with intent to defraud their creditors. The petition, after setting out the attachment bond, averred that there was no cause for the issuing of said attachment; nor was there any sufficient cause for making the charge upon which the same was issued. Damon & Co. demurred to the petition, for the reason that the plaintiff did not aver that there was not sufficient cause for *believing* that plaintiff was about to dispose

of his property, &c. This demurrer was sustained, and the plaintiff refusing to amend, the suit was dismissed. From this judgment he appeals.

W. E. Leffingwell, for the appellant.

Cook & Dillon, for the appellee.

WOODWARD, J.—Upon the question here presented, there has been a difference of opinion in the courts. The subject is considered in Drake on Attachment, in sections 164 to 169, inclusive, and that writer takes the ground that the question of probable cause is not involved. Were the question unsettled, there might be a difference among the members of this court, but it was settled by this court, in the case of *Winchester* v. *Cox and Shelley*, from Polk county, at the June term of this court, in 1853, in which the court decided, that the plaintiff must aver that there was not sufficient cause for *believing*, &c.

We are agreed in giving no weight to the fact, that section 1848, of the Code, uses the word *believes;* nor the fact that section 1852, omits it.

The judgment of the District Court is affirmed.

WALDRON, Administrator, *et al. v.* ZOLLIKOFER.

Where in a suit in equity, brought by the administrator and heirs of the purchaser, to rescind a contract for the sale of real estate, and for damages, on the ground of fraud, which fraud consisted in the respondent's having represented the land to be free from overflow—to be healthy—and that the occupants were not subject to ague or fever, and which fraud was denied in the answer, it appeared in evidence, on the part of the complainants, that the contract was made in May, 1855, and was for about 468 acres of land in a body, on the Maquoketa and Mississippi rivers, of which about 205 acres is bottom, and the balance timber, or bluff, land; that the purchaser, at the same time, bought of respondent some $800 worth of personal property,

and for the land, and this property, was to pay $6,000, $1,000 being paid at the time of the contract; that before and during the negotiation for the farm, and at the time of making the contract, the respondent represented that the bottom land had never been overflowed, but once in fourteen years, and that was caused by the breaking away of a mill dam on the Maquoketa; that during that time, neither he nor his family had been sick with the fever and ague; that these statements were made in answer to questions asked him on those subjects; that respondent complained that his neighbors would always tell those wishing to purchase, that his land overflowed, and he knew, and they knew, that it did overflow; that the purchaser was a stranger in the country; that the land does overflow, and has frequently, if not every year, overflowed, for the last fifteen years; and that it is sickly, and respondent's family did suffer with the ague and fever, as have most of the hands working there since the purchase; and where it appeared in evidence on the part of the respondent, that the purchaser made inquiries of the witness for a farm that would answer for stock business; that witness directed him to some two or three, including the respondent's; that the purchaser examined the respondent's farm, and appeared to be well satisfied, as he found water on it, and upland and bottom sufficient for his purpose; that he inquired of witness how much meadow land there was, and how much on the bluffs that he could plow; that the witness and purchaser had several conversations before the purchase, and at one time the witness told him, in answer to a question, that in high water a portion of the land overflowed—that it might overflow once in four or five years, and he inquired if, when it overflowed, it injured the grass; that the purchaser, after examining the place, told witness there was upland sufficient for the sheep business—that there was four or five hundred acres in a body, and that was what he wanted for a range for his stock; and that in the summer after the purchase, the purchaser was plowing in the bottom, when another witness told him it was no use to plow there, for he was there six or seven years before in a boat, catching fish on that ground—that it was overflowed; to which the purchaser replied, that he knew all about it—that he knew how to fix it—he could put in timothy, and when witness should come there again in two years, the witness would see such a difference that he would not know the place; and where the value of the bottom land, if it did not overflow, was estimated at from $25 to $50 per acre, the weight of evidence being at about $35, but subject to overflow, as it was, it was regarded by some witnesses as worthless, and by others, estimated as high as $10 per acre, and the timber or bluff land was valued at from $15 to $20 per acre; and where the finding on the issue of fraud was in favor of the respondent, and the bill was dismissed; *Held*, That the proof was insufficient to overcome the denial of fraud in the answer, and the bill was properly dismissed.

A sound price ordinarily implies that a sound article is to be received in return. On the other hand, the failure to give a sound price, is ordinarily a strong circumstance, but not conclusive, to show that the parties contracted in view of defects, or the actual value of the thing sold.

Appeal from the Dubuque District Court.

THIS was a bill in chancery to rescind a contract for the sale of land, and for damages, on the ground of fraud in the procurement thereof. The fraud is alleged to consist in the defendant's having fraudulently and falsely represented the land to be free from overflow—to be healthy—and that the occupants (defendant and his family, for fourteen years) were not subject to ague or fever. All fraud is denied in the answer. The proof shows that the contract was made in May, 1855, and was for about four hundred and sixty-eight acres of land, in a body, on the Maquoketa and Mississippi rivers. Of this, about two hundred and five acres is bottom, and the remaining portion timber, or bluff land. The decedent, at the same time, bought of defendant, some eight hundred dollars worth of personal property, and for the land, and this property, was to pay six thousand dollars—one thousand being paid at the time of the contract. One witness swears, that during the time of negotiation between the parties, defendant said that the bottom land had never been overflowed but once in fourteen years, and that was caused by the breaking away of a mill dam on the Maquoketa; and that during that time, neither he nor his family had been sick with the fever and ague, and this was stated in answer to questions asked him on these subjects, and was some days before the contract was finally concluded. The same representations are sworn to by another witness, to have been made at another time, during the negotiation. At another time, it is shown that defendant complained that his neighbors would always tell those wishing to purchase, that his land overflowed, and that he knew, and they knew, it did overflow.

For the defendant, it is proved by one witness, that in the summer after the purchase, the decedent was plowing in the bottom, and that witness told him it was no use to plow there, for he, witness, was there six or seven years before in a boat, catching fish on that ground; that it was overflowed;

and that the decedent replied, "that he knew all about that —he knew how to fix it—he could put it in timothy;" that when witness "should come there again in two years he should see a difference, that he would not know the place." Another witness swears, that decedent made inquiry of him for a farm that would answer for stock business; that he directed him to some two or three, including the defendant's; that he examined the defendant's, and appeared to be well satisfied, as he found water upon it, and upland and bottom sufficient for his purpose; he also inquired of witness how much meadow land there was, and how much *on the bluffs* of defendant's farm, that he could plow. They had several conversations before the purchase, and one time witness, in answer to questions, told him that in high water a portion of the land overflowed; that it might overflow once in four or five years; and that decedent inquired if, when it overflowed, it injured the grass. After examining the place, he told witness there was sufficient upland for the sheep business; that there was four or five hundred acres in a body, and that was what he wanted for a range for his stock. The testimony also shows that the decedent was a stranger in the country, having been there but some four or five weeks. It is abundantly shown, that the land does overflow, and has frequently, if not every year, for the last fifteen years; and it is also shown to be sickly, and that defendant's family did suffer with the ague and fever, as have most of the hands working there since the purchase. Witnesses vary in their estimate of the value of the bottom land; if it did not overflow, the lowest estimate is $25, and the highest $50 per acre; the weight of evidence being at about $35. Subject to overflow, as it is, the bottom is regarded as worthless by some, and by others valued as high as $10 per acre, the average valuation being about $5; the timber on the bluff land is said to be valuable, and valued at from $15 to $20 per acre. This is the substance of the whole proof bearing on the question of fraud. The issue was found in the court below, in favor of defendant, and plaintiff appeals.

Smith, McKinlay & Poor, for the appellant.

Wiltse & Blatchly, for the appellee.

WRIGHT, C. J.—We are not inclined to disturb the decree. We have no hesitation in finding every issue in favor of the plaintiffs, except perhaps the most material one, and that is whether defendant did falsely and fraudulently make the representations charged. We have no doubt but the land does overflow, so as to greatly depreciate what would otherwise be its value. We are equally well satisfied, that the place is sickly, and that both of these facts were known to the defendant. And if the fraudulent representations were sufficiently proved, we would unhesitatingly grant the relief asked.

When we consider, however, that the answer under oath unequivocally denies this charge, and that such answer must be overcome by an amount of proof well understood in chancery practice, and which we need not here state, we are constrained to hold that the proof falls short of this requirement, and the bill must be dismissed. Two witnesses, it is true, swear quite positively to the representations, and a third speaks of a conversation which tends to show a desire or intention on the part of the defendant, to dispose of his place as one not subject to overflow. The witnesses for the defendant do away with much of this testimony, where they speak of the purchaser, acknowledging that he knew all about it, and inquiring for a stock farm; and as to how much of this land could be put in meadow, and how much of the bluff could be plowed; as also of his speaking before the purchase, of the overflow, and there being enough of the upland for the sheep business. But if the case stood alone upon this testimony, we should still find for the plaintiff. There is a circumstance in the case, however, conclusively shown, which to our mind must decide it for the defendant. We allude to the price paid, compared to the actual value of the land, if it did not overflow. Deducting from the $6,000, the price to be paid, $800, for the personal property,

it will be found that the whole land was estimated at a fraction over $11 per acre. Estimating the timber or the bluff land to contain two hundred and sixty-three acres, and valuing it at $15 per acre, it would be worth, . $3,945
Add the personal property, ... 800

$4,745

and we have $1,255, or a fraction over $6 per acre, paid for the bottom land. If we increase the value of the timber land (as we might fairly do, under the testimony), we in the same proportion lessen the amount paid, or probably paid, for the bottom land. Now, if this bottom land was, as is claimed to have been represented, not subject to overflow or sickness, it was worth, according to the testimony, about $35 per acre, and thus the whole tract and personal property would, in fact, have been worth near twelve thousand dollars, instead of the amount agreed to be paid. We ask, then, whether the contract price does not conclusively show that it was bought, not as land free from overflow, but as land subject to overflow, and therefore of less value? And we also inquire, whether it is not as conclusively shown, that the whole tract is worth about the sum paid, or to be paid, for it? If it was shown that a sound price was paid, the case would have been entirely different. A sound price ordinarily implies that a sound article is to be received in return. And on the other hand, the failure to give a sound price is ordinarily a strong circumstance (not conclusive, it is true), to show that the parties contracted in view of defects, or the actual value of the thing sold. We are not satisfied that the fraud is sufficiently substantiated, and the decree is therefore affirmed.

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COOPER *v.* SUNDERLAND.

Section 1508 of the Code, which provides that no person can question the validity of a guardian's sale of real property, after the lapse of five years from the time it was made, is not to be regarded in the nature of a general statute of limitations, so as to apply to sales which had taken place prior to the passage of that statute; but its application should be limited to cases arising under chapter eighty-eight of the Code alone.

In regard to courts superior, and of general jurisdiction, every presumption is made in favor, not only of their proceedings, but of their jurisdiction.

This presumption is not exercised, however, in relation to the jurisdiction of a court inferior, and of limited jurisdiction, but it must be shown.

When the jurisdiction of an inferior and limited court is shown, then the same presumption prevails in favor of its proceedings, that does in favor of those of a superior court.

When the existence of jurisdiction of an inferior court, is once shown or admitted, the judgments of superior and inferior tribunals stand on the same footing, and are equally and absolutely conclusive, when not appealed from, or when attacked collaterally.

A superior court is presumed to act rightly, and within its jurisdiction; but an inferior court should set out the requisite facts on the face of its proceedings.

When the jurisdictional facts are stated on the face of the proceedings of an inferior court, they are taken as *prima facie* proof, or are presumed to be as stated.

But these facts, thus shown by the record of inferior courts, may, perhaps, be contradicted by the papers in the cause, and in some instances, by evidence *aliunde*.

So, also, the facts may oftentimes, if not generally, be proved by evidence *aliunde*.

Whether, when a superior court acts without the scope of its general and common law authority, and by virtue of a special and statutory power, it is necessary to show on the face of its proceedings, that the power has been strictly pursued, in all essential particulars, both as regards the subject matter of the cause and the parties, *quere?*

When power is given to a court over a special subject, which is not in the usual course of the common law, and a mode is prescribed for the exercise of the power, such mode must be pursued, whether the tribunal be a superior or an inferior one, and sufficient must appear on the face of the proceedings, to show the case to be within the reach or jurisdiction of the tribunal.

Whether, in the case of a superior court, this sufficiently appears by the statute conferring the power, and the common law presumptions in favor of such a court, a petition being filed to call up the power, *quere?*

If, however, sufficient appears on the face of the record of the court, to give it

jurisdiction, under the law conferring the power, then the presumption attaches in favor of the remainder of the proceedings of the court, whatever that court may be.

But whether, and in what cases, the facts stated in the record may be contradicted, *quere?*

If there be a petition in relation to the proper subject matter, to call into action the power or jurisdiction of the court, the sufficiency of the petition cannot be called in question collaterally.

If there is a notice, or publication, or whatever else of this nature the law requires, in reference to persons, its sufficiency cannot be questioned collaterally.

Where, in an action of right, it appeared from the records of the proceedings of the District Court, in a proceeding by the guardian to sell the real estate of minors, under chapter eleven of the act in relation to wills, administrators, &c., approved February 13th, 1843, that the court was "satisfied from publication, properly filed, that the notice required by law had been given;" *Held*, 1. That whether section eight of chapter eleven of the act, intends that notice should be given to the wards, *quere?* 2. That chapter eleven did not require personal service on the parties entitled to notice. 3. That the finding of the court as to the service of the notice, was sufficient to confer jurisdiction, at least, until contradicted by proof. 4. That the sufficiency of the notice was a question for the appellate court on appeal, and could not be examined into collaterally.

The provisions of section twenty of chapter eleven of the act relating to wills, administrators, &c., approved January 13th, 1843, are peremptory, and not directory only.

Where, in an action of right, the defendant, to prove title in himself, offered in evidence the record of the proceedings of the District Court, in a proceeding by the guardian of the plaintiff and other minors, to sell the real estate in controversy, under the act of January 13th, 1843; and where it did not appear from the record, or the papers in the proceeding, nor by evidence *aliunde*, that the guardian had taken the oath required by section eleven of chapter eleven of the act; *Held*, That because it did not appear that the guardian had taken the oath prescribed by the statute, that the sale was void.

Under section twenty of chapter eleven of the act of 1843, it must appear, either by averment in the record, or otherwise, that the guardian took the oath required by the statute, before fixing on the time and place of sale of the property of the ward.

Where from the record of the proceedings of the District Court, in a proceeding by a guardian, under the act of 1843, to sell the real estate of the wards, it appeared that the court directed a notice of the sale to be given; that the report of the sale recited that the guardian had advertised the sale according to law; and that the report was followed by a confirmation of the sale by the court; and where there was no notice of the sale returned among the papers, nor any other evidence of its having been given; *Held*, That the evidence of notice of the sale was sufficient, *prima facie*.

The fifth proviso in the twentieth section of chapter eleven of the act of 1843, in relation to wills, administrators, &c., does not refer to the original purchaser solely, but to the person who holds the premises at the time of the commencement of the action.

Appeal from the Des Moines District Court.

THIS is an action of right, commenced by the plaintiff, on the 12th day of October, A. D. 1853, to recover the possession of lot No. 64 (A) in the city of Burlington, of which he claims to be the owner in fee simple. The plaintiff claims title as one of the heirs at law of Thomas Cooper, deceased, who was seized of the premises in fee simple at the time of his death. Thomas Cooper was the father of the plaintiff. The defendants, in their answer, deny the claim of the plaintiff to the premises, and allege title in themselves, by virtue of the following conveyances: 1. By deed from David Wigington and Ann Wigington, his wife, to William and Samuel McCutcheon and John P. and William Sunderland, executed October 3, 1848; 2. By deed from William and Samuel McCutcheon to John P. and Wm. Sunderland, executed February 21, 1850; and 3. By deed from Ann Wigington, formerly Ann Cooper, as guardian of the heirs of Thomas Cooper, deceased, to David Wigington, executed May 1, 1848, under and by virtue of an order and decree of the District Court of Des Moines county. The defendants also pleaded that the plaintiff ought not to maintain his action, because more than five years had elapsed since the execution of the deed from Ann to David Wigington. The plaintiff replied, denying the new matter set up in the answer. The cause was tried by the court, without the intervention of a jury. The plaintiff offered evidence tending to prove title in himself, which need not be set out at length; that defendants had been in possession four or five years; and the premises were worth from $25 to $30, per annum. The defendants, to sustain the issues on their part, offered in evidence the deeds referred to in their answer, and the record of the proceedings in the District Court, under which the land was sold to David by Ann Wigington, as guardian

of the minor heirs of Thomas Cooper, embracing the petition of the guardian for an order to sell the premises; notice of the application for the order, with an affidavit, showing its publication in the Iowa State Gazette, for three successive weeks; a statement of an account with the probate judge, showing the sum of $350, to be due the guardian; an order of the court for the sale of the premises, upon giving the specified notice; a report of the sale to the court, reciting that the sale of the premises had been advertised as required by law, and an order of the court, confirming the sale. The defendants also proved, by J. P. Weightman, who was judge of probate for Des Moines county, at the time the order of sale by the District Court was made, that the plaintiff called on the witness, and was anxious, and officiated in procuring the order to be made, and that the plaintiff was the principal person in attending to, and procuring the order of sale from the District Court. On the trial, it was admitted that the plaintiff was under fourteen years of age, when Ann Wigington was first appointed guardian; that he was over fourteen, and under twenty-one, when the sale was made; and that D. Wigington, who was the purchaser at the sale, during all the time the proceedings were pending, and at the time of the sale, was the husband of Ann Wigington. This being all the evidence, the court found that the plaintiff had title, and was entitled to recover the possession of the land in question, and judgment was entered accordingly. The defendants appeal, and assign for error the rendition of this judgment.

David Rorer and *Browning & Tracey*, for the appellants.

1. We contend that it is too late for the plaintiff to assert his title, if he has any, more than five years having intervened between the probate sale and deed, and the time of commencing this suit. The sale was on the 1st day of May, and the deed was made on the 3d day of May, 1848, and suit was commenced, on the 13th, or at most, upon the 12th day of October, 1853, leaving more than five intervening years. "No action for the recovery of any real estate, sold

by an executor or administrator, &c. shall be maintained by an heir or other person, unless it be commenced within five years," &c. Laws of 1843, § 35. Now it clearly appears by the proceedings in the District Court, in which the decree of sale was obtained, that the claim of plaintiff here, such as it is, is as one of the *heirs* of Thomas Cooper, deceased.

2. We contend, that after decree, sale, and *confirmation* by the District Court, the title of defendants under such decree, sale, and confirmation, cannot be resisted or impeached collaterally, and in an action like the present; for it fully appears, from the bill of exceptions: 1. That the person obtaining the decree, was the guardian, and was licensed to make the sale by a court of competent jurisdiction; 2. That the guardian gave bond, which was approved as required by law; 3. That the proper oath was taken; 4. That proper notice was given; 5. That the premises were accordingly sold by public auction, and are held by those who purchased in good faith. See Laws of 1843, § 36. And the said sale, having been confirmed by decree of the District Court, such confirmation renders the matter *res judicata*, as to the provisions of the above cited section, not only so, by the general law, but more especially when taken in reference to section 37 of the laws of 1843, which clearly contemplates a remedy against the guardian, for any wrong, neglect, or other injury, in regard to such sale. In the case of *Barney by her next friend* v. *David Saunders et al.*, 16 Howard, 535, the court say: "The acts of Saunders as administrator, &c., are not the subject of review in this suit. He settled his account as administrator in the orphan's court, and the allowance made there, *cannot be reviewed collaterally* in another court." *Gates* v. *Loftus*, 4 Monroe, 444; *Irby* v. *McCrea*, 4 Dessaussure, 422; *Simpson* v. *Hart*, 1 John. Ch. 91; *Price* v. *Nesbit*, 1 Hill, 461; *Thompson* v. *Tolmie et al.*, 2 Pet. 157; *Akins & Swift* v. *Kinnon*, 20 Wend. 241; *Grignons' Lessee* v. *Astor et al.*, 2 How. 319; *Ex parte Watkins*, 3 Pet. 206; *United States* v. *Arredondo and others*, 6 Pet. 729; *Jackson ex dem. Jenkins* v. *Robinson*, 4 Wend. 436; *Wright* v. *Marsh*, *Lee*

& Delevan, 2 G. Green. 94; Sugd. on Vend. 184; Fonb. Eq. 91, note; Story on Agency, 8; 3 Johns. Ch. 543; 8 Peters, 284; 3 Pick. 280; 1 Dallas, 186; 2 Doug. 433.

J. C. Hall, for the appellee.

It is insisted on the part of the appellee, that the court had no jurisdiction over the subject matter or the persons, when the order of sale was made; that the sale was void, because made to the husband of the guardian; and that Ann Wigington was not guardian. Chapter 10 of the act of 1843, which is made the rule, for guardian sales, contemplates and requires, that a petition of a guardian, shall make all persons interested, parties, and that the proceedings shall be adversary. Section 8 requires that a notice of the petition, and of the time and place of hearing, shall be given to all persons interested, that they may appear and show cause, &c., which notice must be served on "them personally, fourteen days, at least," before the time appointed for hearing the petition, or published three weeks successively in such newspaper as the court shall order. This section certainly means and contemplates, that all persons who may be interested, shall be named in the petition; it uses the words "all persons" and "them." A general notice to all persons, cannot be served personally; nor is it a notice to a party in these proceedings. In the case at bar, the notice published is for one purpose; the petition filed, is for another purpose. It was an absolute condition to the exercise of jurisdiction, that these notices should have been served, and specifically contain all legal requisites. See *Milbourn* v. *Faut*, and *Spratt* v. *Marshall*, December term of this court, 1854; *Heirs of Otis Reynolds* v. *May*, June term, 1854; *Pinkney* v. *Pinkney*, June term, 1854; *Hodges* v. *Britt*; *Clark* v. *Graham*, 6 Wheat. 577; 5 Cond. 192; 4 Phil. Ev. Cow. & Hill's Notes, 1000; 1 Black. 35; 3 Black. 230; 12 Ohio, 272; *Greenvault* v. *Farmers and Mechanics' Bank*, 2 Doug. (Michigan) 498; and cases there cited.

As to the power of Mrs. Cooper to act as guardian after

Edwin became 14 years of age, see 11 Ohio, 442; *Erb* v. *Strong*, 2 Ib. 402; *Palmer* v. *Oakley*, 2 Doug. (Michigan) 434, and cases there cited; 4 Bacon's Abridgment, 584.

The sale to her husband was void, and no sale. *Bohart et al.* v. *Atkinson*, 14 Ohio, 230, and cases there cited; *Campbell* v. *Walker*, 5 Vesey, 678; *Ex parte Hughes*, 6 Vesey, 617; *Durae* v. *Fanning*, 2 Johnson, 552; 10 Ohio, 120; *Armstrong* v. *Huston*, 8 Ohio, 554; 2 Johnson, 268; *Smith* v. *Rice*, 11 Mass. 567.

When jurisdiction depends upon the character or occupation of the party, evidence is admissible to show that the party was not such a character. *Wise* v. *Withers*, 3 Cranch, 33; *Mills* v. *Martin*, 19 Johnson, 7; 1 Willis, 152; 2 Ib. 382. The subsequent proceedings are, in no respect, in conformity with law, and by the fairest implication of section 36 of the act, are void. The judgment of confirmation, was without any authority. No law in force authorized such an act of the court, and it was extra-judicial.

WOODWARD, J.—There are two acts of the legislature which have relation to the case. The first, is that of January 25th, 1839 (Rev. Stat. of 1842, 1843, chap. 99, 430), entitled an act concerning minors, orphans, and guardians. The second, is that of February 13, 1843 (Rev. Stat. 1843, chap. 162, 666), entitled an act relative to the probate of wills, executors, administrators, guardians, trustees of minors, and probate courts, and for defining their duties. For the sake of brevity, we will refer to these, as the first and the second act.

There is a difficulty presented in the second of the above acts, which calls for some preliminary attention. Chapter ten of this act, is entitled "of the sale of lands, for the payment of debts, by executors, administrators, and guardians;" whilst chapter eleven, relates entirely to sales by guardians. The provisions of the two relative to guardian's sales, are in some respects, dissimilar. The question is, which chapter is to govern in this cause. As the act has been repealed, we need not enter into a discussion of the matter, but will

only remark, that there is much which would lead to the idea, that the provisions of chapter eleven, relate principally to guardians of insane persons, spendthrifts, &c. This view would be countenanced by the fact, that the title of chapter ten, refers to sales to pay debts, and a minor can have no debts, but for maintenance, and that for this, chapter eleven expressly provides; besides chapter eleven, and the first act above referred to, cover the whole subject of minors and their guardians; and if chapter ten, be considered as relating to minors' debts, and the charges in the case at bar be regarded as debts, in distinction from maintenance, still section 24 of chapter 10, perhaps, removes the difficulty, by providing that in such cases, sales may be made as directed in this (10th) chapter, "excepting in the particulars in which a different provision is hereinafter made," which refers to the next chapter undoubtedly. We shall, therefore, make chapter eleven our guide, and its provisions are in general like those of the preceding chapter.

The first question which arises is, upon the limitation of such actions. The second act, chapter 11, section 19, provides that no action for the recovery of any estate sold by a guardian, under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship." Then follows an exception in favor of minors and others, under legal disability, to whom five years are allowed, after the removal of the disability. There is nothing in the case showing that the action was not brought within five years next after the termination of the guardianship; and still more, it does not appear, but that it was brought, in due time after the removal of the disability of minority. On the contrary, the presumption from the facts shown, is, that the action is free from the objection that it was not brought in due time. That it was not commenced within five years after the sale, is not a valid objection under the former acts, without adverting to the fact of their repeal. But it is said that the plaintiff's right of action is barred by the Code, § 1508,

which is, that "no person can question the validity of such sale, after the lapse of five years, from the time it was made." The sale was made on the first May, 1848, and the action was commenced the 13th of October, 1853, more than five years after the sale. The repeal of the act of February, 1843, by the Code, took effect on July 1st, 1851. The question then, is, whether section 1508, of the Code, bars the plaintiff's right to bring this action, to question the validity of the sale. The point is presented, but not argued. We are not disposed to regard this section of the Code as in the nature of a general statute of limitation, so as to apply it to sales which had taken place prior to the passage of that statute, but should limit its application to causes arising under chapter eighty-eight of the Code alone. But if it were to be regarded as an ordinary statute of limitation, then those principles would apply, which are settled in the cases of *Morris* v. *Slaughter*, 1 G. Greene, 338; *Forsyth* v. *Ripley*, 2 Ib. 181; *Hinch* v. *Weatherford*, 2 Ib. 244; *Gordon* v. *Mounts*, 2 Ib. 243.

Objection is made to the sale of the lot in this case, upon three grounds: First, because the court decreeing the sale, had jurisdiction of neither the subject matter, nor the person; second, because the minor was over fourteen years of age, when the petition for leave to sell, was filed; third, because the sale was made to the husband of the guardian. The want of jurisdiction of the person, arises, if at all, from a want of notice to the minors; and the questions involved in this objection, are difficult of solution. The American editors of Smith's Leading Cases (5th ed.), Vol. I, p. 844, very truly remark, that the inquiry, when, and under what circumstances, the proceedings of inferior courts, are to be regarded as void for want of notice, is unquestionably involved in much obscurity and confusion. But they add, that this difficulty may, in some degree, be obviated, or remedied by remembering that the question, when notice shall be presumed, is a very different one from that of the effect of a want of notice, when proved or conceded. We have strongly experienced this obscurity and confusion in examining a

mass of cases, to ascertain an intelligible rule by which to determine this cause. They seem, generally, to be decided, each upon its own facts, without much reference to rules; or when such are sometimes given, the mind feels its darkness nearly as much in understanding and applying them, as in groping its way without them. See 10 Peters, 474. In this, and in similar cases, the questions arise, what is a superior, and what an inferior court? when presumptions attach in its favor? what is jurisdiction, and when does it attach? whether notice, or other matter which must appear, may appear by the record of the judgment, or must be shown otherwise? whether a superior court, acting in a matter, not of common law jurisdiction, but committed to it by statute, is to be regarded as a court of inferior and limited jurisdiction? or whether those presumptions attach to it, which pertain to a superior court, and when a court may decide on its own jurisdiction, or how far the decision is conclusive?

On these questions, it requires a treatise, rather than an opinion in a cause, to reduce the cases to consistency and a system; and an illustration of what even a laborious treatise can do with the subject, is to be found by comparing the first and last sentences of a paragraph in 1 Smith's Lead. Cases, pp. 832, 833. The first is, that "whatever may be the rule with regard to courts of general powers, when acting within the scope of those powers, it is well settled that when they do not, and exercise a special and statutory authority, their proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, and will be invalid, unless the authority on which they are founded, has been strictly pursued;" citing *Denning* v. *Corwin*, 11 Wend. 647; *Jackson* v. *Esty*, 7 Ib. 148; *Sharp* v. *Speir*, 4 Hill, 16; *Striker* v. *Kelly*, 7 Ib. 11; *Matter of Mount Morris Square*, 2 Ib. 14; *Williamson* v. *Berry*, 8 How. 495; *Same* v. *Ball*, 8 Ib. 566; *Matter of Flatbush Avenue*, 1 Barb. 289; *Muskett* v. *Drummond*, 10 B. & C. 153; *Christie* v. *Unwin*, 11 A. & E. 373; *Brancker* v. *Molyneux*, 4 M. & G. 226; *Roswell's Lessees* v. *Otis*, 9 How. 336; *Thacher* v. *Powell*,

6 Wheat. 119; *Mayhew* v. *Davis*, 4 McLean, 213; *Embury* v. *Connor*, 3 Comst. 511. The last two sentences of this paragraph are as follows: "The inconveniences which may occasionally result from this course of decision, are more than compensated by the lesson which it teaches, that from whatever source power may come, it will fail of effect, when unaccompanied by right. It should, notwithstanding, be remembered, that the severity of this doctrine is tempered in practice by the maxim *omnia rite acta*, which is emphatically applicable to judicial proceedings, and that every intendment will be made in favor of the validity of the acts of a court within the scope of its powers, whether those powers are limited or general," citing *Voorhees* v. *Bank of United States*, 10 Peters, 449; *Dykman* v. *The Mayor, &c.*, 1 Seld. 494.

Now, it seems to the mind of the writer of this opinion, that this second proposition overturns the first, for the first proposition is this, in effect, that, if a court is not acting within the scope of *general* (that is, *common law*) powers, that is, when it is acting under limited or special powers, they are to be strictly pursued (and examined); and the second proposition is, that when acting within the scope of its powers, *whether limited* (that is, special) *or general*, every intendment shall be made. But it is doubted, whether the two cases cited support the second proposition. In the second case, no "intendment" was made in favor of the court superior and of general jurisdiction, upon a matter of attachment, which is not a common law proceeding; and this case rather suggests a new rule, or a modification of former rules, such as this, that when some process or proceeding, not known at common law, is added to, and incorporated into, the proceedings of a court superior and general of jurisdiction, and made a part thereof, it is to be adjudicated as one of its ordinary powers, and not as a power or subject conferred upon it distinct from, and independent of, its common law jurisdiction. Thus, attachment, which is the subject of *Voorhees* v. *The Bank*, is added to, or incorporated into, the powers of the court, and is to be adjudged upon like its other powers. So, the subject

of mechanics' lien, is new, created by statute, and yet it is apprehended that this, and its process too, is to be adjudicated upon the same rules with the ordinary powers and proceedings of the court. These remarks are made as indicating the obscurity of the subject, and the difficulty of ascertaining the true rules which should guide us. This is seen even in the able and labored note above referred to, which is an attempt to reduce the subject to order. We will, however, endeavor to extract some rules, which shall serve as guides in the determination of the cause before us. In regard to courts superior, and of general jurisdiction, every presumption is made in favor, not only of their proceedings, but of their jurisdiction. This proposition is familiar, and needs no support. But see 1 Smith's Lead. Cases (5th ed.), notes 816, 848, where the subject is considered, and the cases are cited. This presumption is not exercised, however, in relation to the jurisdiction of a court inferior and limited, but must be shown. Note, *supra*, pp. 816, 818, 822, 848, with authorities. The rule is thus briefly stated in *Peacock* v. *Bell*, 1 Saund. 74. "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears so; nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged." But where the jurisdiction of an inferior and limited court is shown, there the same presumption prevails in favor of its proceedings, that does in favor of those of a superior court. See note, *supra*, 817, 818, 847, 848; *Reeves* v. *Townsend*, 2 Zabriskie, 396; *Wilson* v. *Wilson*, 18 Ala. 176; *Clark* v. *Blacker*, 1 Cart. 215; *Paul* v. *Hussey*, 35 Maine, 97; *Wight* v. *Warner*, 1 Doug. 384; *Fox* v. *Hoyt*, 12 Conn. 491; *Raymond* v. *Bell*, 18 Ib. 81. "Whatever intendment may be made in favor of the decision, there can be none in aid of the right to decide," &c. *Perrine* v. *Farr*, 2 Zabris. 356; *Bridge* v. *Bracken*, 3 Chand. 75; *Supero*, *Crawford Co.* v. *Leclire*, 4 Ib. 56; *Denipster* v. *Purnell*, 3 M. & G. 375; *Rowland* v. *Beale*, 1 Cowp. 19. When inferior courts have not transcended their powers, "and their

jurisdiction has actually attached, it will not be lost by an irregularity in the mode of exercising it; and every intendment will be made in aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction." Note, *supra*, 847, citing *Grignons' Lessee* v. *Astor*, 2 How. 319; *Brown* v. *Wood*, 17 Mass. 68; *McPherson* v. *Cunliff*, 11 S. & R. 422; *Reeves* v. *Townsend*, 2 Zabris. 396; *Den* v. *O'Hallon*, 1 Ib. 582; *Pierce* v. *Irish*, 31 Maine, 254; *Wyman* v. *Porter*, 6 Porter, 219; *Samuels* v. *Findley*, 7 Ala. 645; *Rey* v. *Vaughan*, 15 Ib. 497; *Cox* v. *Davis*, 17 Ib. 71 ; *Savage* v. *Benham*, Ib. 119; *Williams* v. *Sharp*, 2 Cart. 101; *Small* v. *Hampstead*, 7 Mo. 373; *Pendleton* v. *Pendleton*, 12 S. & M. 302; *Tryon* v. *Tryon*, 16 Vert. 313; *McFarlin* v. *Stone*, 17 Ib. 165; *Clark* v. *Holmes*, 1 Doug. 390.

"When, however, the existence of jurisdiction is once shown or admitted, the judgments of superior and inferior tribunals stand on the same footing, and are equally and absolutely conclusive," that is, when not appealed from, or when attacked collaterally. Same note, 820–848, citing *Heard* v. *Shipman*, 6 Barb. 445; *Steen* v. *Bennett*, 24 Vert. 303; *Farrar* v. *Olmstead*, Ib. 123; *Lawrence* v. *Englesby*, Ib. 42; *Wesson* v. *Chamberlain*, 3 Comst. 331; *Fort* v. *Battle*, 13 S. & M. 133; *Grear* v. *McLendon*, 7 Georg. 362; *Williams* v. *Sharp*, 2 Cart. 101; *McLean* v. *Hugarin*, 13 Johns. 184; *Cunningham* v. *Bucklin*, 8 Cow. 187; *Heard* v. *Shipman*, 6 Barb. 621; *Clark* v. *Holmes*, 1 Doug. 390; *Reeves* v. *Townsend*, 2 Zabris. 396. The next inquiry is, *how* shall the necessary facts or circumstances conferring jurisdiction, "be shown," "or appear," in courts of inferior jurisdiction? A good deal of the ambiguity of cases, seems to rest on the answer to this question, as applied in practice. A superior court is presumed to act rightly and within its jurisdiction, but an inferior court should set out the requisite facts on the face of its proceedings; note, *supra*, 816, 818, and many authorities. When the jurisdictional facts are stated on the face of the proceedings of an inferior court, this is taken as *prima facie* proof; or they are presumed to be as stated.

But these facts, thus shown by the record of inferior courts, may perhaps be contradicted, as by the papers in the cause, and in some instances by evidence *aliunde*. And they may also, oftentimes (if not generally), be proved by evidence *aliunde*, page 816 and authorities; page 820, citing *Jenks* v. *Stebbins*, 11 Johns. 224; *Barber* v. *Winslow*, 12 Wend. 102; *Clark* v. *Holmes*, 1 Doug. 390; *Denning* v. *Corwin*, 11 Wend. 648; *Borden* v. *Fitch*, 15 Johns. 121; *Harrington* v. *The People*, 6 Barb. 607; *Noyes* v. *Butler*, Ib. 613; *The People* v. *Cassels*, 5 Hill, 164; *Walker* v. *Mosely*, 5 Denio, 102; and page 843, as to parties, citing *Adams* v. *Jeffries*, 12 Ohio, 253; *Bigelow* v *Stearns*, 19 Johns. 39; *Corwin* v. *Merritt*, 3 Barb. 345; *Fisher* v. *Lane*, 3 Wilson, 834; *Ege* v. *Sidle*, 3 Barr, 124; *Commonwealth* v. *Green*, 4 Whart. 568; *Smith* v. *Rice*, 11 Mass. 507; *Chase* v. *Hathaway*, 14 Ib. 222; *Corliss* v. *Corliss*, 8 Vert. 373; *Enos* v. *Smith*, 7 S. & M. 85; *Gelstrop* v. *Moore*, 4 Cushman, 206; *Joslin* v. *Coughlin*, Ib. 134. The case of *Dykman* v. *The Mayor of N. Y.*, 1 Seld. 434, is a recent case on similar questions, and may possibly throw doubt on the foregoing proposition as to contradicting the record. The proceedings were those of commissioners, to appropriate lands to the use of the Croton water works. If the owner and the commissioners could not agree, it was brought into court. The action was ejectment, brought to recover lands so taken. GARDINER, J., says, "It (the disagreement) was distinctly stated in the petition, and sworn to upon the knowledge of one of the commissioners. This was all that was necessary to give the vice-chancellor jurisdiction *prima facie*. The fact was an issuable one," which, he says, "the party might have controverted, and then it must have been proved, but he was not at liberty to lie by, and in ejectment for the land, insist that due proof was not made;" and he adds: "I am inclined to think that if the requisite proof was made, to sustain the allegation, jurisdiction would attach, although the witness was mistaken or perjured." And FOOT, J., says that, "when the jurisdiction of a court of limited authority (the vice-chancellor), depends on a fact which must be ascertained

by that court, and such fact appears and is stated in the record of its proceedings, a party, who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterward, in a collateral action against his adversary in those proceedings, impeach the record, and show the jurisdictional fact therein stated to be untrue, and he cites *Mathew* v. *Hood*, 8 Johns. 50; *Griswold* v. *Stewart*, 4 Cow. 458; *Van Steenberg* v. *Bigelow*, 3 Wend. 42; *Brittain* v. *Kinnard*, 1 Brad. & Bing. 432; *S. C.*, 4 Moore, 50; *Smith* v. *Elder*, 3 Johns. 113.

The license for sale in the present case, having been granted by the District Court of Iowa, the question what is a superior, and what an inferior court, does not present itself. But another takes its place; which is, whether this superior court is, in the present instance, to be regarded as one of limited and inferior jurisdiction, and whether its proceedings in this matter are to be viewed as those of an inferior court? Here is a special authority, or power, or jurisdiction, conferred upon the court by statute provision. It is one which it had not by the common law, and which is not connected with, and is not made part of the ordinary proceedings of the court. It is not incorporated into them, but is independent of them. It is probably a question of authority, more than of reason, for it is doubtful if there is any principle of reason or justice which decides either way. But if the artificial rule be assumed, that where a superior common law court is acting, out of the common law line, by virtue of an authority specially conferred, it is acting as an inferior court, then in granting the license to sell, the District Court was, in effect, an inferior court, and its acts are to be viewed in that light. The note in 1 Am. Lead. Cases (5th ed.), 843, states the following rules on this subject: "The rule seems to be the same (as with an inferior court), when a superior court acts without the scope of its general and common law authority, and by virtue of a special and statutory power, for it then becomes necessary to show that the power has been strictly pursued in all essential particulars, both as it regards the subject matter of the cause, and

the parties," and cites *Williamson* v. *Berry*, 8 How. 495; *Williamson* v. *Bell*, Ib. 566; *Webster* v. *Reid*, 11 Ib. 437; *Denning* v. *Corwin*, 11 Wend. 647. And the same note, on page 832, has the following: "Whatever may be the rule with regard to courts of general powers, when acting within the scope of those powers, it is well settled, that when they do not, and exercise a special and statutory authority, their proceedings stand on the same footing with those of courts of inferior and limited jurisdiction, and will be invalid, unless the authority on which they are founded, has been strictly pursued," and cites *Denning* v. *Corwin*, 11 Wend. 647; *Jackson* v. *Esty*, 7 Ib. 148; *Striker* v. *Kelly*, 7 Hill, 11; *Thacher* v. *Powell*, 6 Wheat. 119; *Boswell* v. *Otis*, 9 How. 336; *Matter of Mount Morris Square*, 2 Hill, 14; *Sharp* v. *Speer*, 4 Ib. 76; *Williamson* v. *Berry*, 8 How. 495; *Same* v. *Ball*, 8 Ib. 566; *Matter of Flatbush Avenue*, 1 Barb. 289; *Mayhew* v. *Davis*, 4 McLean, 213; *Embury* v. *Conner*, 3 Comst. 511.

Of these cases, the first four support the doctrine quoted, but the remaining nine, do not support either this or the preceding quotation. But time does not permit an examination of them, to point out the errors in the reference to them. The following cases support the doctrines just quoted: *Ludlow's Heirs* v. *Johnson*, 14 Ohio, 679; *Adams* v. *Jeffries*, 12 Ohio, 253; citing (not above cited) *Bend* v. *Susquehanna Bridge and Bank Co.*, 6 Har. & J. 130; *Smith* v. *Fowle*, 12 Wend. 9. On the other hand, there is a class of cases of high authority, which do not seem to consider whether the court is a superior or an inferior one, nor whether it is subject to the rules of an inferior court; but give full sway to the doctrine of presumptions. Of this class, are *Elliot* v. *Piersol*, 1 Pet. 328; *Thompson* v. *Tolmie*, 2 Ib. 157; *Ex parte Tobias Watkins*, 3 Ib. 193; *United States* v. *Arredondo*, 6 Ib. 691; *Voorhees* v. *Bank U. S.*, 10 Ib. 450; *Philadelphia and Trenton R. R. Co.* v. *Stimpson*, 14 Ib. 448; *Grignons' Lessee* v. *Astor*, 2 How. 319; *Barney* v. *Saunders*, 16 How. 535; *Perkins* v. *Fairchild*, 11 Mass.

227; *M'Pherson* v. *Cumliff*, 11 S. & R. 422; *Wright* v. *Marsh et al.*, 2 G. Greene, 95.

In *Elliot* v. *Piersol*, 1 Pet. 328, the court says: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct, or otherwise, its judgment, until reversed, is regarded as binding in every other court." In *Thompson* v. *Tolmie*, 2 Pet. 157, the heirs of Tolmie, deceased, brought a petition for partition in the Circuit Court for the District of Columbia, and partition was awarded; but the property being reported indivisible, it was sold. Afterwards, the heirs brought ejectment, and held the sale void, because none of the heirs had become of age at the time of the sale, and the statute *expressly prohibited a sale until the eldest was of age.* Mr. Key, of counsel for the plaintiffs, contended that the proceedings did not derive their authority from the general powers of the court, and that, therefore, it was necessary that all the facts upon which the powers were exercised, should appear. The court say: "These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and did receive its final ratification. The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them, that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceedings, either before the same, or an appellate court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification, and may be rejected, when collaterally drawn in question." "The only objection," says the court, "that presents any difficulty, is, that it was proved that none of the heirs of Robert Tolmie had arrived at age when the sale was made, and how far this will affect the sale,

will depend upon the question, whether the proceedings in partition, when brought up in this collateral way, were open into an inquiry into that fact." They suggest the question, whether the jurisdiction depended upon that fact, and argue that it may well be inferred that the petition intended to assert that Margaret was of age; and say, that at all events, the age of the heirs was a matter of fact, upon which the court was to judge; that even if the jurisdiction of the court depended on that fact, it is by no means clear that it would be permitted to contradict it, on a *direct* proceeding to reverse any order or decree of the court. But to permit that fact to be drawn in question in this collateral way, is certainly not warranted by any principle of law. "The rules which apply to and govern titles acquired under sales made by order of orphans' courts and courts of probate, are applicable to the case now before the court." They refer to the above quotation from *Elliot* v. *Piersol*, 1 Pet. 340, and say: "This is the clear and well-settled doctrine of the law, and applies to the case now before the court. The jurisdiction of the court over the subject matter appears on the face of the proceedings, and its errors and mistakes, if any were committed, cannot be corrected nor examined, when brought up collaterally, as they were in the Circuit Court." But the case of *Grignons' Lessee* v. *Astor*, 2 How. 319, reviews the whole subject, and becomes very important. The administrator of Pierre Grignons, sold land belonging to his estate for the payment of debts, and the heirs bring ejectment to recover it, holding the sale void. The law of Michigan, in which state the case arose, made the same requirements of an administrator, and of a guardian, in order to obtain authority to sell. The license was granted by the county court (by which is understood a court of common pleas, or of general jurisdiction), which was authorized thereto by law. The law required the administrator to make a representation of the condition and indebtedness of the estate, and that such representation should be accompanied by a certificate from the judge of probate, certifying the value of the real and personal estate, and the amount of debts, and

also *his opinion* whether it is necessary that real estate should be sold. The law also provided, that the court previously to passing on the representation, should order notice to be given to all parties, or their guardians, and it directed, that before a sale, the administrator should enter into bond, and give a certain prescribed notice of the sale. Several of these requirements are made under a *proviso*, which, according to the case of *Voorhees* v. *The Bank*, 10 Pet. 471, make them as conditions precedent to the exercise of the power.

Objections were made on all the above points, that the fulfillment of these requirements did not appear on the face of the record, nor in the papers. The court say, the whole merits of the controversy depend on one single question. Had the county court of Brown county, jurisdiction of the subject on which they acted? They define jurisdiction, citing 6 Pet. 709, and 623; 12 Pet. 718; S. S., 3 Pet. 205. They style this, a proceeding *in rem*, citing 11 S. & R. 526, and say that the jurisdiction of orphans' courts, and all courts who have power to sell the estates of intestates, is irrespective of the parties in interest. The court, then, proceed to say, that no other requisites to the jurisdiction of the county court are prescribed, than the death of Grignons; the insufficiency of his personal estate to pay his debts; and a representation thereof to the court, making these facts appear. Their decision was the exercise of jurisdiction which was conferred by the representation; that it did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner; and if the decree does not specify the facts and reasons, nor refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes they were, such as to justify their action," citing 14 Pet. 458. The recitation of facts in the license is referred to, but that is not so full as the order of the court in the case at bar. They say: "After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of pro-

bate, as that was a requisite, to the action of the court; their order of sale is evidence of that, or any fact which was necessary to give them power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem*, after a final decree by a court of competent jurisdiction over the subject matter. The granting the license to sell, is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not, is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not. The record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it, is not bound to look beyond the decree," &c. "These principles are settled as to all courts of record which have an original general jurisdiction over any particular subject; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term. That applies to courts which are created on such principles, that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities, if their jurisdiction does not appear on their face, is this, a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings, the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description. There can be no judicial inspection behind the judgment, save by appellate power." "The court," they say, "has a right to

decide every question which occurs in a cause," citing 1 Pet. 340, "and such," they add, "must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem*, as *in personam*," citing 10 Pet. 473. "Titles acquired under the proceedings of courts of competent jurisdiction, must be deemed inviolable in collateral actions, or none can know what is his own."

The case of *Perkins* v. *Fairfield*, 11 Mass. 227, which is several times cited in the cases in the federal court, was decided in accordance with the rules set forth in the above cases from Peters and Howard, although it was decided before them. The license was granted to administrators, by the Court of Common Pleas, upon a certificate from the judge of probate, not warranted by the circumstances of the estate, and the administrators did not give bond as required by statute. The Supreme Court say: "That court had jurisdiction of the subject matter. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence from the probate court, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction." It is not easy to determine with clearness, how to class the above case of *Grignons' Lessee* v. *Astor*. It certainly bids defiance to the rule, that a superior court acting in a special matter, out of the course of its common law jurisdiction, acts as a court of inferior and limited jurisdiction.. It must be classed, either, as a case giving to the superior court in such cases, the full weight of the presumptions which belong to its common law jurisdiction, or as one which considers all such cases as proceedings *in rem*. And either of these grounds, may be predicated of it. This case, and the rules adopted in the others from the Supreme Court of the United States, seem to take away the grounds and reasoning of many of the cases decided in the state courts. And, in truth, there is a necessity that some superior power should lay hands on them, and marshal them into order, or prescribe rules to which they should be squared; for it is doubtful whether a rule can be

extracted from them. It is probable that the rules laid down in the foregoing federal cases, will be found subversive of the great mass of the state cases.

A few other cases will be referred to, bearing more immediately upon the points before suggested: *Ludlow's Heirs* v. *Johnson*, 1–4 Ohio, 679; *Lessee of Goforth* v. *Longworth*, 1–4 Ib. 750; *Ewing* v. *Higby*, 6–7 Ib. 340; *Le Grange* v. *Ward*, 11 Ib. 257; *Adams* v. *Jeffries*, 12 Ib. 253; *Payne* v. *Morland*, 15 Ib. 435; *Robb* v. *Lessee of Irwin*, 15 Ib. 689; *Bloom* v. *Bendick*, 1 Hill, 130; *Corwin* v. *Merritt*, 3 Barb. 341; *Ranoul* v. *Griffee*, 3 Md. Rep. 54. Many cases treat these distinctly as proceedings *in rem*, even when the statute provides for notice. Such are 2 How. 319; 11 S. & R. 432; 12 Ohio, 272; 6 Har. & J. 23; 7 Ohio, 201; 11 Mass. 227; 15 Ohio, 689; 9 Ib. 19. And all those cases, impliedly, which give emphasis to the fact of the court having jurisdiction of the subject matter; and such it undoubtedly is in its nature, for it certainly is not an adversary proceeding. Without finally determining whether a superior court, acting in a special matter, is to be treated as an inferior and limited court, we find in the foregoing investigation some method by which the case before us may be determined by rule, and not on detached cases only. When a power is given to a court over a special subject which is not in the usual course of the common law, and a mode is prescribed, such mode must be pursued, whether the tribunal be a superior or inferior one; and sufficient must appear to show the case to be within the reach or jurisdiction of the tribunal. Whether in the case of a superior court, this sufficiently appears by the statute conferring the power, and the common law presumptions in favor of such a court (a petition being first filed to call up the power), the state and federal courts seem to differ widely. If, however, sufficient appears on the face of the record (or proceedings) of the court, to give it jurisdiction under the law conferring the power, then the presumption attaches in favor of the remainder of the proceedings of the court, whatever that court may be. But whether, and in what cases, the facts stated

in the record, may be contradicted, remains in doubt, even as regards an inferior court. See 1 Smith's Lead. Cas. (5th ed.) note, pages 820, 821, 824, 842. If there be a petition, on the proper matter of that nature, to call into action the power or jurisdiction of the court, the sufficiency of it cannot be called in question collaterally. This is for the appellate power only. If there be a notice or publication, or whatever of this nature the law requires in reference to persons, its sufficiency cannot be questioned collaterally. 1 Smith's Lead. Cases, note, *ut supra*, 837, 843; *Wright* v. *Sheldon*, 1 Seld. 497; *Borden* v. *The State*, 6 Eng. 519; *Ewing* v. *Higby*, 6–7 Ohio, 343; *Paine* v. *Moreland*, 15 Ib. 435; *Wright* v. *Marsh et al.*, 2 G. Greene, 109. The questions made in the case at bar, may be quickly settled under those rules, so far as they are to determine them. The first objection made to the proceedings of the District Court is, that it had jurisdiction of neither the subject matter nor the parties. We do not understand that a serious question is made as to the jurisdiction over the subject, for the authority to grant such a license, is given by both the acts before referred to. Next, is the want of notice to the parties, as is alleged; that is, to the minors, or to the next of kin. Chapter eleven, section eight of the second act referred to, provides that "no such license shall be granted, until notice by public advertisement or otherwise, as the court shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate," &c. This is the section applicable here, and it may be doubted whether it intends a notice to the wards. But at all events, it is sufficiently answered by the record, which finds that the court (among other things), being satisfied from publication, properly filed, that the notice required by law has been given," orders, &c. This chapter does not require personal service. The above is sufficient to give jurisdiction, at least until contradicted by proof, and we do not now decide whether such proof could be received. As to the objection that the petition should lie over one term, and the publication should be made between the terms, we do not understand that this

practice relates to matters of this kind—matters of a probate nature. But, however that may be, the sufficiency of the notice is a question for appeal, and cannot be brought up collaterally. So far as these objections go, the sale will have to be sustained, unless we find difficulty in the act of 1843, chap. 11, § 20. It is as follows: "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

"First. That the guardian was licensed to make the sale by a court of competent jurisdiction.

"Second. That he gave bond (approved), in case one was required by the court granting the license.

"Third. That he took the oath prescribed in this chapter.

"Fourth. That he gave notice of the time and place of the sale, as prescribed herein.

"Fifth. That the premises were sold accordingly, at public auction, and are held by one who purchased them in good faith." One of the leading purposes of the preceding investigation, is to ascertain *how* the required matters must or may appear, and in what sense the word "appear" may be taken in the foregoing statute. Upon this we are satisfied. The next inquiry is, as to whether the provisions of the above section 20, of chap. 11, Stat. 1843, are to be taken as peremptory, or as directory only. It is true that the argument in favor of the directory character of this section, is countenanced by the penalty provided by the next section, in case of any neglect or misconduct in the proceedings of the guardian, by which any person interested shall suffer damage. But the reasoning, on the other hand, is too weighty to be overcome by this consideration. In the first place, why are these provisions in the statute? Do they not bear a specific meaning? Do they mean no more than the settled rules would have taught, without them? Do they not at once impress the mind as peremptory requirements? The language is, that "the sale shall not be avoided on account of

any irregularity in the proceedings, provided that it shall appear that the five following facts exist. Does not this language admit of this change of proposition: The sale shall not be avoided for any irregularities, *except* in the following particulars, and therefore that the sale *may* be avoided on account of irregularities in the following particulars; and again, that the sale may be avoided, provided the following facts do not appear. The sense manifestly is, that the sale shall not be held void for minor irregularities, nor for any such, if certain leading requirements are observed. But these must be observed. The contrary reasoning would be this, and no other: The sale shall not be avoided, if these things appear (which is by statute); and if they do not appear, the sale will be sustained upon adjudicated principles. By this process, it is brought to pass that whether they appear or not, is immaterial, since in the one case the statute sustains the sale, and in the other, the adjudicated cases. This fritters away the statute, and makes it mean nothing. But we believe it was written and enacted to have its appropriate effect, and however the rules of law, and the adjudicated cases, might dispose of these matters, if this section did not exist; and however important we may esteem it, to sustain sales of this description, when it can be done fairly, our duty now is only to square this case by these provisions, and find how it bears the test, and pronounce accordingly. As to the first condition, we have found that the guardian was licensed by a court of competent jurisdiction. As to the second, no bond was required by the court. The third is, "that he took the oath that is prescribed in this eleventh chapter," section 11. Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath, in substance like that required to be taken by executors, administrators, and guardians when licensed to sell real estate. This clearly refers to section 11, of chapter 10, where the oath is given, and it is "that in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing on the time and place of sale, and that he will exert his utmost endeavors, to dispose of

the same in such manner as will be most for the advantage of all interested therein." Without the foregoing provision of the 20th section, on which we are commenting, such an oath simply required, might be *presumed* after a confirmation of the sale, on the principles of the cases before cited; but under this statute, there can be no such presumption. The importance of this requirement is not for us to decide; but we can see its fitness in the present case, at least, when it is in evidence that the sale was made to the *husband of the guardian.* There is no evidence, either in the record, or in the papers, nor is any brought to our knowledge *aliunde*, that this oath was taken. The guardian makes a report of her sale, but does not state it. There is a judgment confirming the sale, but this goes no farther than to say (in allusion to the report), "which having been examined by the court here, and the court being fully advised of and concerning the premises, it is ordered," &c. The statute says it must "appear" that she took this oath, and the least we can require is, that the record shall aver it; or that it should appear otherwise. The above record does not answer the call of the statute.

As to the fourth requirement, "that she gave notice of the time and place of sale, as prescribed." This refers to section 12 of chap. 10, which we think refers to the act of 1839 (Stat. 1843, page 433, § 11), which provides that the court shall direct the notice. In this case, the court directed a notice of the sale, and the report recites that she advertised "according to law." But there is no such notice returned among the papers, nor any other evidence of its having been given. But, on the strength of some of the cases above cited, we are inclined to think, that this allegation in the report, followed by the confirmation, a part of which is above quoted, is sufficient *prima facie.* As to the fifth condition, "that the premises are held by one who purchased them in good faith," we are disposed to consider this as meaning one who holds them at the time of the action, and not as referring to the original purchaser solely; and there

is nothing tending to show that the defendants did not purchase in good faith.

Therefore, because it does not appear that the guardian took the oath required by the statute, the sale must be held void. This result dispenses with the necessity of considering the other points in the cause.

The judgment of the District Court is affirmed.

NOTE BY THE COURT.—We desire to say to the profession, both for this and other causes, that our access to books is very limited. We cannot, therefore, in this case, determine the correctness of the citations of many of the cases in the note in 1 Smith's Leading Cases, but we give them, that others, having better opportunities, may examine.

YOUNG *v.* MUMMA.

Where in an action on two promissory notes, the defendant answered under oath, denying generally the allegations of the petition; and where the defendant subsequently filed a supplemental answer, under oath, denying the execution of the notes, and averring that W. Y., the assignor of the plaintiff, by fraud and misrepresentation, induced the defendant to execute to said W. Y. two receipts, which had been changed and added to since they were signed, until they read as set forth in the plaintiff's petition, setting out the circumstances under which the receipts were executed, which answer called for a replication under oath; and where a replication not under oath was filed, which, on motion, was stricken from the files, and the cause was tried on the petition, answer, and supplemental answer; and where on the trial, the plaintiff withdrew one of the notes, and the signature to the other was admitted by defendant, and the same was read to the jury; and where, there being no other evidence than the note, before the jury, the jury found a verdict for the plaintiff, which verdict the court refused to set aside.

Held, 1. That the issue to be tried was on the first answer of the defendant.

2. That the supplemental answer, not being replied to, was to be taken as true, and so far as the facts therein alleged were applicable to the issue joined between the parties, they could not be contradicted on the trial.

3. That the verdict of the jury was against the evidence, and the court should have granted the motion to set aside the verdict, and ordered a new trial.

Appeal from the Polk District Court.

SUIT on two promissory notes for $357.50 each, dated December 31st, 1852, and payable with interest, one and two years after date, purporting to have been made by defendant to one William Young, and assigned to plaintiff, January 3d, 1856. The answer of defendant is a general denial of the plaintiff's petition, under oath, on which issue was joined. There was afterwards filed a supplemental answer of defendant, under oath, denying the execution of the notes, and averring that said William Young, the assignor of plaintiff, by fraud and misrepresentation, induced defendant to execute to said Young, two certain receipts in writing, which have been changed and added to since defendant's signature was written thereto, until they read as set forth in plaintiff's petition. The answer alleges affirmatively, the circumstances under which the said receipts were given, and charges that they have been fraudulently altered into the promissory notes declared on, which are alleged to be without consideration and void. The supplemental answer requires the replication of plaintiff thereto, to be made under oath. A replication was filed, but not being under oath, as required by defendant's answer, the same was stricken from the files, on motion of defendant; and the cause was tried on the petition and answer, and supplemental answer, there being no replication to the supplemental answer. One of the notes was withdrawn by plaintiff, by leave of court, before the case was submitted to the jury, and the signature to the other was admitted by defendant, and the same was read to the jury. No other evidence was offered on either side. The jury found a verdict for the plaintiff for $427.21. The defendant moved the court to arrest the judgment, and grant a new trial, which was overruled by the court, and judgment rendered for the plaintiff, from which defendant appeals.

Brown & Elwood, for the appellant.

No appearance for the appellee.

STOCKTON, J.—The first answer of defendant denies the execution of the promissory notes sued on; that defendant ever authorized any one to execute them for him; that they have been assigned to plaintiff; and denies generally being in any manner indebted to plaintiff. On this answer, there was issue joined by plaintiff; the defendant afterwards filed an amended or supplemental answer, not waiving his first answer, in which he alleges affirmative facts as a defence to plaintiff's action, and the same being sworn to, he requires the plaintiff to reply thereto under oath, as allowed by section 1744 of the Code. The replication filed by plaintiff to this supplemental answer, was stricken from the files by order of the court, the same not being under oath as required; and the parties went to trial, with the supplemental answer of defendant, not replied to. So far as the facts therein alleged were applicable to the issue joined between the parties, they could not be contradicted on the trial. Code, § 1742. Taking the supplemental answer, and the facts therein set forth, as true, there can be no question but that they constituted a good defence to the plaintiff's action. The verdict of the jury was, therefore, against the evidence, and the court should have granted the motion of defendant to set the same aside, and order a new trial.

Judgment reversed.

Iowa.
3 142
108 360
108 363
108 653
f108 655
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e110 279
a110 280
3 142
112 152

WINTER, Adm'r *v.* HITE *et ux.*

An executor, administrator, or guardian, cannot give a promissory note which shall be binding as such on the estate he represents, or on his ward.

An executor, administrator, or guardian, is individually liable on such promises.

Where a *feme sole* executed a promissory note as executrix of the estate of her late husband; and where she subsequently married, and herself and husband were sued on such note, in their individual capacity; *Held*, That the action was maintainable, and the wife was personally liable on the note.

Appeal from the Jefferson District Court.

ROSANNA DE FRANCE, the widow of Hugh De France, being the administratrix upon his estate, or the executrix of his will, gave to Solomon Kerns a promissory note for the payment of one hundred dollars, which she signed, "Rosanna De France, executrix of the estate of Hugh De France, deceased." She afterward married Hite. Suit upon the note was brought by the administrator of the estate of Kerns, against her and her husband, alleging the action to be brought on such a promissory note signed by her in the above manner. The defendant demurred, for the reason that the action was brought against her personally, and not against the representative of the estate, and the demurrer was sustained.

Slagle & Achison, for the appellant.

Charles Negus, for the appellee.

WOODWARD, J.—The action is maintainable in the form in which it is brought. The administratrix is personally responsible. An executor, administrator, or a guardian, cannot give a promissory note which shall be binding as such on the estate he represents, or on his ward. He is individually answerable upon such promises. This has long been well settled law. *Thacher* v. *Dinsmore*, 5 Mass. 299; *Foster* v. *Fuller*, 6 Mass. 58; *Childs* v. *Monino*, 2 Broad. & Bing. 460; 6 Eng. C. L. 200; *Hills* v. *Bannister*, 8 Cow. 31; *Barker* v. *Mech. Fire Ins. Co.*, 3 Wend. 94; *Binney* v. *Plimby*, 5 Vert. 500; also, note to 1 Amer. Lead. Ca. 604; Chit. on Bills (ed. 1842), 32–3, and note. The same doctrine applies to many cases of persons signing with the designation of trustees, or committees, and the like. But this class of cases is not to be examined in connection with that of agency, next to be alluded to.

It is important that these cases, especially those of admin-

istrators and guardians, should not be confounded with those of agency. When one acting as agent, signs a contract or promise, *having authority*, and his agency and principal appearing upon the face of the instrument, he is not personally liable. But if it does not appear upon the paper, that he acted as agent, or if he had not authority, he renders himself personally responsible. See the case of *Harkins* v. *Edwards & Turner*, 1 Iowa, 426. And in the case of *Baker* v. *Chambliss*, June term, 1854, this doctrine was applied to the board of directors of a school district, who, as such board, executed a promissory note for money due for building a school-house. The whole subject is discussed in the note to 1 Am. Lead. Ca. 602. This line of distinction has been clearly marked. An executor, administrator, or guardian, is not an *agent* in any such sense as above intended. He is so in a *general* sense, it is true, but his virtual and real character is of another class. With him, it is not a mere question of *fact*, whether he have authority, for there is no one to give it, but it is a question of *law*, and the law denies the authority. For instance, suppose the administrator, who gives a note and signs it in this manner, goes out of office, and another is appointed, it cannot be pretended that his successor would be liable on the note.

But, on the other hand, if he who so signs an instrument, is sued in that representative capacity, it may well be doubted, whether he could abate the suit for that reason; but the query would then be, whether the judgment should not be a personal one. Another question which may arise upon such an instrument, is, whether it may not be used as evidence of an indebtedness by the estate. We are not aware that these questions have been settled.

The present case decides only, that the promissor is liable personally, notwithstanding the words of description. The demurrer should have been overruled.

The judgment of the District Court is reversed.

SARGENT *v.* HEROD, Administrator, *et al.*

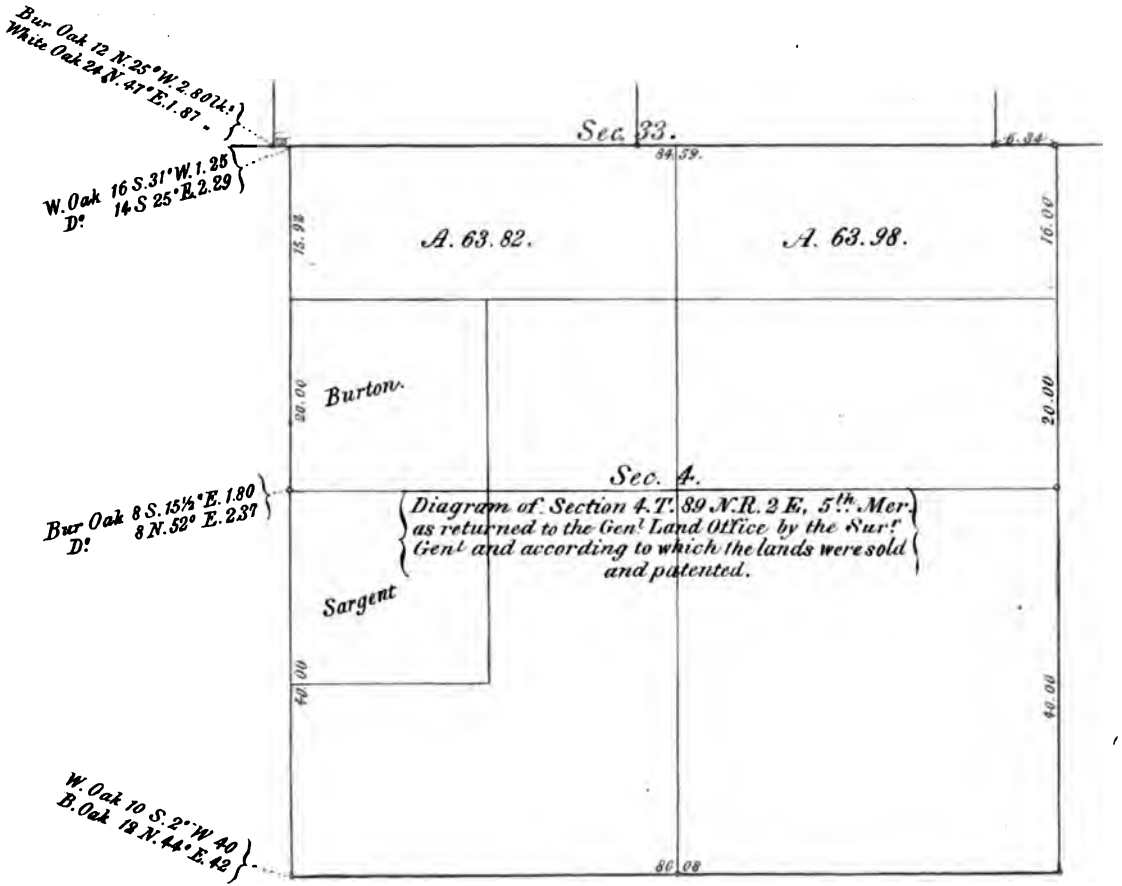
In cases of disputed boundary, the general rule is, that courses, distances, admeasurements, and ideal lines, must yield to known and fixed monuments, natural or artificial, upon the ground itself.

Where in an action to settle a disputed boundary, it appeared on the part of the complainant, that five witnesses discovered what they believed were the stumps of the bearing trees of the corner claimed by the complainant as the correct and established corner; that these stumps, in course and distance from the corner, corresponded with the original field notes; that one of them bore marks such as are usually put on bearing trees by surveyors, with a marking iron; that a portion of the letters were indistinct, but two of the witnesses thought they were the letters B. T.; that three of the five witnesses were practical surveyors, and the evidences were such that they did not hesitate to place the corner at the point claimed by complainant as the true corner; that the surveys made by them were in the years from 1845 up to 1854; and that no original corner post was found, but a stake was placed at what the witnesses determined to be the true original corner; and where one of two other witnesses on the part of complainant, was a chainbearer in 1849, when the corner was found and established by the deputy county surveyor, and the other witness was present at the same time, and he testifies that he had known the corner for ten years, and had been shown the stump of the witness tree, which had been cut down many years before for firewood; that he showed the corner to the county surveyor, on the occasion referred to by the other witness; that the surveyor cut into the stump, and found the marks of the surveyor's marking iron; that this stump being taken for that of one of the witness trees, at the proper course and distance from it, the county surveyor established the corner, and from the same, according to the original government field notes, at the proper course and distance, he found what he judged to be the stump of the other witness tree; and the point fixed upon by these two witnesses is identical with the corner claimed by the complainant; and where, on the part of the respondent, it appeared that three witnesses, who are practical surveyors, searched for the stumps of the bearing trees of this corner, but could not find them; that the first witness surveyed the premises in 1852, but could find no stumps such as are spoken of by the complainant's witnesses, or evidences of the corner; that he established the corner at the point claimed by respondent, by apportioning the distance according to the original report of the survey; that the second witness run the line in 1855; that he found no original corner of the quarter section, and no bearing trees to show the corner; that he established the corner at the same point, by apportioning the distance; that the third witness surveyed the land as early as 1850, and twice in the year 1855; that he could find no trace of the original corner; that he had surveyed the land shortly after the land sales of 1837, and after a thorough

search, was satisfied that all evidence of the original corner was gone; that he found a stump of a tree which was a right course, distance, and size, for one of the bearing trees; that it was the stump of a tree that had been cut down seven or eight years, but after a thorough examination, he found no evidence of its being a bearing tree; that it was an old stump, the bark off, and rotten; that it might have been marked, but no signs or marks could be discovered at the time he saw it; and that he would establish the corner at the point claimed by the respondent, by measurement; *Held*, That the weight of evidence was in favor of complainant, and that the corner was originally established at the point claimed by him.

Appeal from the Dubuque District Court.

THIS is a suit in chancery, to establish the boundary line between the owners of the northwest quarter of the southwest quarter of section four, township 89, range 2 east, and the southwest quarter of the northwest quarter of the same section. The plaintiff claims to have been the owner of the premises first mentioned, since June, 1852, and that the defendants are the owners of the adjoining land on the north; that the lands are mineral lands, and that large quantities of lead ore have been dug and raised on the same, near the dividing line between the parties, which is the east and west centre line of said section; that the eastern part of said line is not disputed, but is identified; that the western terminus, being the original quarter section corner between sections four and five, is not settled, the evidence of the position of the same, to wit, the original bearing trees, having been cut down several years before, and the stumps being decayed, so that their identity rests in parol; that the defendants claim that the corner is one chain and twenty links south of the point claimed by plaintiff; and to the end that multiplicity of lawsuits may be avoided, and the said confusion of boundary line remedied, the plaintiff prays that the corner and boundary line may be established by the court; and that an account may be taken of the quantity of mineral, and the value of the same, received by defendants from the land in dispute; and that they be adjudged to pay the value of the same to plaintiff, and be enjoined from setting up any claim to the premises in dispute. The answer of de-


Bur Oak 12 N.25°W.2.80 Lk.
White Oak 24 N.47°E.1.87
Sec. 33.
34.59.
6.34
W. Oak 16 S.31°W.1.25
D° 14 S 25°E.2.29
15.92
A. 63.82.
A. 63.98.
16.00
Burton.
20.00
20.00
Sec. 4.
Bur Oak 8 S.15½°E.1.80
D° 8 N.52° E.2.37
Diagram of Section 4. T. 89 N. R. 2 E. 5th. Mer.
as returned to the Genl Land Office by the Surr.
Genl and according to which the lands were sold
and patented.
Sargent
40.00
40.00
W. Oak 10 S.2°W.40
B. Oak 12 N.44°E.42
80.08

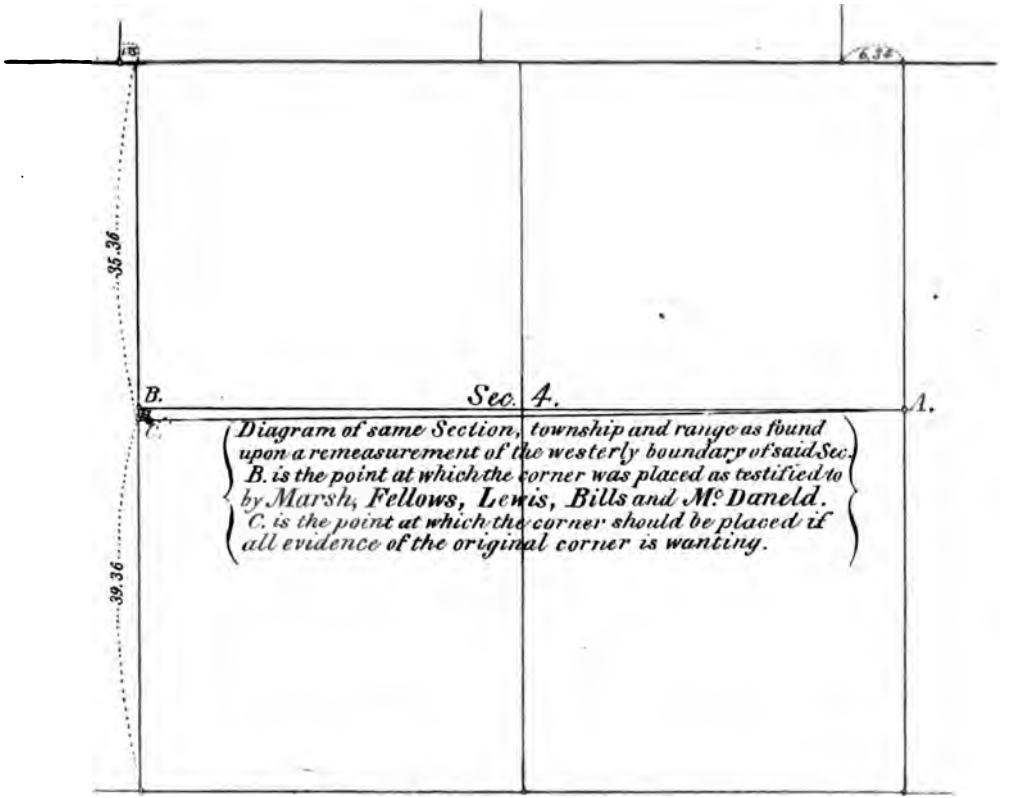


Diagram of same Section, township and range as found upon a remeasurement of the westerly boundary of said Sec. B. is the point at which the corner was placed as testified to by Marsh, Fellows, Lewis, Bills and Mc Daneld. C. is the point at which the corner should be placed if all evidence of the original corner is wanting.

fendant admits the title of plaintiff and defendants in the tracts of land as set forth in petition, but denies that the point claimed by plaintiff, as the western terminus of the boundary line between them, is the correct point at which to establish the quarter section corner between sections four and five; denies that the corner was established at the point claimed by plaintiff; that any bearing trees were ever there; and that the stumps referred to are the stumps of the bearing trees of the established corner. They claim the land in dispute, and ask that the corner C, shown in the diagram accompanying the transcript, may be established as the true corner, and the line AC as the true boundary line, between the parties. It is agreed that the government lines were run in 1837; and that the annexed diagram represents the land in dispute, and the lines and corners claimed by each party.

The issue being made between the parties, the testimony taken, was directed to the question, whether there was any proof that the point claimed by the plaintiff was ever established by the government surveyors as the quarter section corner of sections four and five. Five witnesses testify that they discovered what they believed were the stumps of the bearing trees of the corner, marked on the diagram as B, and claimed by the plaintiff as the correct and established corner. These stumps, in course and distance from the corner, corresponded with the original field notes. One of them bore marks such as are usually put on bearing trees by surveyors, with a marking iron. A portion of the letters were indistinct, but two of the witnesses think they were the letters B. T. Three of the five witnesses, were practical surveyors, and the evidences were such, that they did not hesitate to place the corner at B, the point claimed in the diagram, by plaintiff, as the true corner. The surveys made by them were in the years, from 1845 up to 1854. No original corner post was found, but a stake was placed at what the witnesses determined to be the original corner. Of the other two witnesses whose depositions were taken by plaintiff, one of them was a chain-bearer in 1849, when the corner was

found and established by the deputy county surveyor; and the other one was present at the same time, and testifies that he has known the corner for ten years, and had been shown the stump of the witness tree, which had been cut down many years before, for firewood. He showed the corner to the county surveyor, who on the occasion aforesaid, cut into the stump, and found the marks of the surveyor's marking iron. This stump being taken for that of one of the witness trees, at the proper course and distance from it, the county surveyor established the corner, and from the same, according to the original government field notes, at the proper course and distance, he found what he judged the stump of the other witness tree. The point fixed upon and ascertained by these witnesses, is identical, and is shown on the diagram by the letter B, and is the corner claimed by the plaintiff.

The evidence on the part of the defendant, is negative in its character. Three witnesses, who are practical surveyors, testify that they searched for the stumps of the bearing trees of this corner, without success; they could not find them. The first witness surveyed the premises in 1852, but could find no stumps such as are spoken of by plaintiff's witness, or evidences of the corner. He established the corner at C on the diagram, by apportioning the distance according to the original report of the survey. The second witness run the line between the sections three and four, in 1855; he found no original corner of the quarter section, and no bearing trees to show the corner. He established the corner at C on the diagram, by apportioning the distance. The third witness surveyed the land as early as 1850, and twice in the year 1855; he could find no trace of the original corner. He had surveyed the land shortly after the land sales of 1837, and after a thorough search, was satisfied that all the evidence of the original corner was gone. He found a stump of a tree which was a right course, distance, and size, for one of the bearing trees. It was the stump of a tree that had been cut down seven or eight years, but after a thorough examination, he found no evi-

dence of its being a bearing tree. It was an old stump, the bark off and rotten; the witness says it might have been marked, but no signs or marks could be discovered at the time he saw it. He says he would establish the corner at C on the diagram, by measurement.

Smith, McKinlay & Poor, for the appellants.

Wiltse & Blatchley, for the appellee.

STOCKTON, J.—It is conceded, on the part of the plaintiff, that the point C on the diagram, claimed by the defendant as the true corner, is the place where the corner should be established, if all evidence of the original corner is wanting. The point C has been ascertained by the witnesses with accuracy, and the surveys were no doubt made by them with great care; but can we overlook the evidence that the corner originally established, was at B? Five witnesses testify that they found at B what they believed were the evidences of the original corner. The testimony of the witnesses for defendants on the same point, amounts to no more than this; that they did not meet with such evidences, and were not convinced that any such existed. We do not know with certainty, that they ever examined the stump, taken to be the stump of the bearing tree, by the witnesses on the part of plaintiff, and described by them. They may have been at another stump than that spoken of by plaintiff's witnesses; for there is no certainty that their testimony refers to the same one to which the testimony on part of the plaintiff refers. But even on the supposition that they all refer to the same stump, five of the witnesses give their opinion that it is the stump of the bearing tree of the corner, while three testify that they were not convinced that it had ever been a bearing tree. We think that the weight of the evidence is in favor of the plaintiff, that the corner was originally established at B on the diagram. The general rule is, that courses, distances, admeasurements, and ideal lines, should

yield to known and fixed mouuments, natural or artificial, upon the ground itself. *Cleaveland* v. *Smith*, 2 Story, 288.

The judgment of the District Court is therefore affirmed.

HARMON *v.* CHANDLER.

By pleading over and going to trial, a defendant waives his demurrer to the petition.

In order to bring before the appellate court, and make it part of the record, any paper used, or proceeding had, in the District Court, which is not made a part of the record by statute, it must be embodied in a bill of exceptions, or so plainly identified therein, that there cannot possibly be any mistake as to what is referred to.

To refer in a bill of exceptions, to a motion or instruction as "marked A—here insert it," is not sufficiently certain for the ends of justice.

Where a bill of exceptions did not show what instructions were asked, nor that any exception was taken to the giving or refusing of any instructions by the court, but stated that "exceptions were taken to the rulings of the court, and to its refusal of instructions to the jury, appearing in the motion for a new trial;" *Held*, That the appellate court could not go to the motion for a new trial, to find what ought to have been embodied in the bill of exceptions.

Where the plaintiff in an action, filed a replication denying generally the new matter set up in the answer, and thereupon the parties went to trial; and where it was assigned for error in the Supreme Court, that the plaintiff having failed to reply specifically to the affirmative defence set up in the answer, has admitted facts which constitute a defence, and therefore judgment should have been for the defendant; *Held*, That if any more specific replication was necessary to secure an impartial trial, the defendant should have brought the matter before the District Court, by motion or demurrer; and that having gone to trial on the issue joined on the defendant's answer; this court could not interfere with the verdict, for the reason that the replication was not sufficiently specific.

An assignment of error as follows, "That the court erred in its action in regard to the jury," is so vague and general, that the appellate court will be justified in disregarding it, under rule eight of this court.

Appeal from the Story District Court.

THIS suit is brought to recover damages for an alleged fraud practiced upon plaintiff by defendant, in inducing him

to enter into a written agreement to take a lot of sheep of the defendant for a term of years, and to return the same number of merchantable sheep at the end of the time, and also to deliver to defendant, one and a half pounds of wool annually per head. The petition avers that defendant falsely and fraudulently represented the sheep to be in good condition, and healthy, well knowing, at the time, that they were unsound; and that plaintiff had, by means of the false and fraudulent representations, been induced to enter into the written agreement, and had thereby been damaged to the amount of six hundred dollars; that plaintiff had been at great trouble and expense in taking care of the sheep; and that they had wholly failed to be of any profit to him, and had died. The answer is a general denial of the allegations of the petition, with an affirmative allegation, that plaintiff did not take ordinary care of the sheep, and in consequence thereof, they died; and that they were killed by improper feeding. There was a replication denying the answer, and issue thereon. Verdict and judgment for plaintiff, and defendant appeals.

Brown & Elwood, for the appellant.

Knapp & Caldwell, for the appellee.

STOCKTON, J.—There are various errors assigned by the appellant, for which, it is claimed, that the judgment in this case should be reversed. The first is, that the court overruled the demurrer to plaintiff's petition. The answer to this is, that the defendant waived his demurrer, by pleading over and going to trial.

The second is, that the court erred in refusing to charge the jury, as asked by defendant. To this we answer, that the bill of exceptions does not show what instructions were asked by the defendant, nor that any exception was taken, to the giving or refusing of any instructions by the court. The bill of exceptions states, that "exceptions were taken to the rulings of the court, and to its refusal of instructions

to the jury, appearing in the motion for a new trial." We cannot go to the motion for a new trial, in order to find what ought to be embodied in the bill of exceptions. In order to bring before this court, as a part of the record, any paper used, or proceeding had, in the District Court, not made a part of the record by statute, it must be embodied in the bill of exceptions, or so plainly identified, that there cannot possibly be any mistake as to what is referred to. To refer to a motion or instruction as "marked A—and here insert it," is not sufficiently certain for the ends of justice, and this court has heretofore expressed its decided condemnation of such a practice. *Reed* v. *Howard*, 1 G. Greene, 153; *Humphrey* v. *Burge*, Ib. 223.

The third assignment of error is as follows: "The plaintiff having failed to reply to the affirmative defence set up in the answer, has admitted facts which constitute a defence, and therefore judgment should have been for the defendant." The assignment is based on what we conceive is a misapprehension of the facts. The plaintiff did reply to the affirmative allegations of the answer, and denied the same, as appears by his replication contained in the record. If the defendant supposed any more specific replication was necessary to insure an impartial trial, he should have brought the matter before the District Court, by motion or demurrer. Having gone to trial, as the parties did, on the issue joined on the defendant's answer, we cannot interfere with the verdict, for the reason urged by defendant.

The fourth assignment of error is, "that the court erred in its action in regard to the jury." This assignment is so vague and general, where it was certainly in the power of the party to make the same explicit, and to point out with reasonable clearness, the objection intended to be made to the action of the District Court, that we might be justified in disregarding it, under the rule of this court. 1 Iowa, 8. We cannot undertake to hunt through the record for errors, not plainly and explicitly brought to our notice. A conclusive answer to the alleged error is, however, found in the remarks we have made above, in relation to the second as-

signment of error. We will not look into the motion for a new trial, to find what it is the duty of the party to embody in his bill of exceptions. It does not, otherwise than by the defendant's motion, appear that the jury returned more than one verdict, nor what the verdict alleged to have been first returned, was. The bill of exceptions shows, that the defendant objected to the court giving any charge to the jury, after they had brought in a verdict for $1,800; that the court overruled the objection, charged the jury; and that they retired to deliberate upon another verdict. What the charge of the court was, is not shown. Nor does the record show affirmatively, that any error was committed by the court. Even if there was error in the action of the court, the defendant ought not to complain of the verdict and judgment against him being reduced from $1,800 to $595. The errors complained of, not being made to appear to the satisfaction of this court, the judgment of the District Court is affirmed.

Judgment affirmed.

Fort *v.* Wilson.

A land warrant possesses none of the qualities of negotiable paper, and is to be treated as a chattel only.

F. placed in the hands of S. two land warrants to be located, and took from him a receipt as follows: "Received, Lansing, August 31, 1852, from James Fort, land warrants Nos. 10,711 and 75,279, to be located upon the southeast quarter of section one, and upon the northeast quarter of section twelve, in township 97, north of range four, west of the fifth principal meridian," which was signed by S. Land warrant No. 10,711 was properly located in the name of F., on a part of the land. The other warrant, No. 75,279, was assigned in blank, when delivered to S., who sold it to W. On the 6th of October, 1852, W. located the warrant on a portion of the land described in the receipt of S. The warrant was sold to W. for a valuable consideration, and without notice of the rights of F. F. then filed his bill against W. to compel a conveyance of the land on which the warrant was located.

Held, 1. That W. could not hold the warrant as against F., were it now in his possession, and an action were instituted for it.

2. That there was no trust between F. and W., and the warrant could not be traced into the land.
3. That W. was liable to F. for the value of the warrant, which might be recovered in this action.

Appeal from the Jackson District Court.

THIS is a bill in chancery to cause the respondent to convey to the complainant, the southeast quarter of section one, in township ninety-seven, north of range four, west of the fifth principal meridian, situated in the county of Alamakee, The bill alleges that James Fort placed in the hands of J. H. Skeel, land warrant No. 75,279, taking the following receipt: "Received, Lansing, August 31st, 1852, from James Fort, land warrants Nos. 10,711 and 75,279, to be located upon the southeast quarter of section one, and upon the northeast quarter of section twelve, in township No. 97, north of range four, west of the fifth principal meridian.

"J. H. SKEEL."

That warrant No. 10,711 was properly located in the name of Fort, but that Skeel had no authority to sell No. 75,279, but only to locate it. It appears, by a copy of the land office certificate, that this warrant was located upon the other tract of land named in Skeel's receipt, in the name of the respondent, on the 6th October, 1852; and that on the 7th October, 1852, Skeel sold this warrant to F. S. & D. S. Wilson. The warrant was issued to another person, and assigned in blank, as is usual.

Burt & Barker, for the appellant.

I. The warrant was not negotiable, and the plaintiff having never parted with his title, may follow it in whosesoever hands the same may be found. The warrant in law is real estate, and would be treated as such in the descent of property. The instructions of the department of the interior, expressly negatives all idea that land warrants are negotiable instruments. If custom among business men is referred to as making warrants negotiable, then we say that the taking of a guaranty from the seller—as is usual—and was

done in this case, rebuts the presumption of negotiability arising from custom. But custom has not, and could not, make warrants negotiable.

II. If the warrant is held to be personal property, and not as real estate, then we say that there was a wrongful conversion of the warrant, and the plaintiff may recover it from the possession of any person in whose hands he may find it; and if his property has been converted into land, he may recover the land. *Murray & Ogden* v. *Burling*, 10 Johns. 172; 8 Cow. 95; *Baker* v. *Wheeler*, 8 Wend. 505.

III. If we admit that Skeel sold the warrant to Wilson, who bought it in good faith, yet the title of the warrant would not pass to Wilson, as between him and the plaintiff; because the sale of the warrant by Skeel was a fraud, and would no more enable him to pass title to Wilson, than if he had stolen and undertaken to sell the plaintiff's horse. *Allison* v. *Mathhieu*, 3 Johns. 235; *Andrew* v. *Dieterich*, 14 Wend. 31; *Root* v. *French*, 13 Ib. 570; *Hitchcock* v. *Covill*, 20 Ib. 167; *Hoffman* v. *Carow*, 22 Ib. 285; *Acker* v. *Campbell*, 23 Ib. 372; *Robinson* v. *Dauchy*, 3 Barb. 20; 1 Hill, 311.

IV. Equity will consider that done which ought to be done: and that money is land, and *vice versa*, as equity may require. Another principle, equally undeniable, is, that "he who furnishes the purchase money is entitled to the land." *Jackson* v. *Steinburgh*, 1 Johns. Cases, 153; *Foot* v. *Tracey*, 1 Johns. 45; *Jackson* v. *Benson*, 11 Ib. 91; *Jackson* v. *Mills*, 13 Ib. 462; *Jackson* v. *Morse*, 16 Ib. 196; *Russell* v. *Allen*, 10 Paige, 249; Adams' Eq. chap. 4, 349; 1 Am. Lead. Cas. 544.

David S. Wilson, pro se, cited the following authorities: *Rossiter* v. *Rossiter*, 1 Am. Lead. Cas. 555; *Putnam* v. *Sullivan*, 4 Mass. 45; *Clement* v. *Leverett*, 12 N. Hamp. 317; *Bank of Limestone* v. *Penick*, 5 B. Monroe, 25; *Bank of Commonwealth* v. *Emry*, 2 Dana, 142; *Decatur Bank* v. *Spence*, 9 Ala. 800; *Goodwin* v. *McCoy*, 13 Ib. 271; *Hayt* v. *Seeley*, 18 Conn. 358; *Ferguson* v. *Childress*, 9 Humph.

382; *Stewart* v. *Donnelly*, 4 Yerger, 177; *Kesler* v. *Zimmerschitte*, 1 Texas, 50; *Root* v. *French*, 13 Wend. 570; *Goodman* v. *Harford*, 4 N. Hamp. 454; *Lane* v. *Borland*, 2 Shep. 77; Chit. on Cont. (6th Am. ed.) 685, note 1; *Lickbarrow* v. *Mason*, 2 Term R. 70; *Pierson* v. *Tom*, 1 Texas, 577; 1 Story's Eq. 119, 189; *Coles* v. *Anderson*. 8 Humph. 489; *Vere* v. *Lewis*, 3 D. & E. 182; *Griffith* v. *Reed*, 21 Wend. 502; *Kendall* v. *Galvin*, 15 Maine, 131; *Raborg* v. *Peyton*, 2 Wheat. 389; *Jones et al.* v. *Overstreet*, 4 B. Mon. 548.

WOODWARD, J.—The facts upon which the question of the case arises, are: The warrant was assigned in blank. Skeel was then the holder, under his receipt given to Fort; and Skeel sold to the Wilsons, for an adequate valuable consideration, they being purchasers without notice. And the main question is, whether the Wilsons can hold the warrant. We think they cannot. Much of the law in this, and similar subjects, is collected in 1 Am. Lead. Cas. 524 to 556, and other authorities are cited by the counsel. If this were commercial, negotiable, paper, there would be no question. Is it, then, to be treated as such, or as a chattel merely—a piece of property, in the more ordinary sense? We answer, as a chattel only. It possesses none of the qualities of negotiable paper. The law does not contemplate it as assignable by delivery, or blank indorsement. The law supposes every assignment to be filled and made complete. Act of Congress, March 22, 1852.

If a deed of conveyance, lease, bond, or other paper, were placed in the hands of an agent for a certain purpose, and to be delivered to a certain person, on the performance of some act, the name of the grantee, lessee, &c., being left blank for whatever cause, but to be filled up by the agent at the proper time; no one would contend that he could sell it to whomsoever he pleased, and fill up the blank with whatever name. The cases from New York, cited by counsel, if applicable, would seem to determine the point in favor of the appellee, for he was an innocent purchaser. The

points there held are these: 1. A fraudulent purchaser cannot hold against the vendor. 2. If the fraudulent vendee sell to a third person, "for a valuable consideration, without notice, the innocent purchaser shall hold." But every one of those cases, is one of a sale to a fraudulent party. And it is to this state of facts, that they apply the readily admitted doctrine, that if one of two innocent persons must suffer, by the act of another, it shall be he who put it in the power of another to do the wrong. This doctrine cannot be stated with its qualifications; and stated in any general form, it is subject to much qualification. Thus, if I put my horse to agist, or for similar purposes, with another, by bailment, and he sell him, I, literally put it in his power to do a wrong, by selling him to a third and innocent person. But the power here given him, is a mere, a naked power, unaccompanied by any authority, or right, or property. And it is apprehended that some of them, in some shape or degree, must accompany the power, in order to bind me; and that the agent's or bailee's act, in violation of all right, duty, and property, has not been brought within the above doctrine. If it were, no one could trust his property, of any kind, in the hands of another. The doctrine is familiar, that he that has no title, can give none. And the note cited in 1 Am. Lead. Cas. 556, says, "But of other property than negotiable instruments, possession is not a power of disposition." See also Chit. on Con. (4th Am. ed.) 178.

This case opens to us a field of discussion, and it is an inviting one; but the time does not permit an indulgence in it. The argument is here brought directly to its point, and we arrive at the conclusion, that the Wilsons could not hold the warrant, were it now in their possession, and an action were instituted for it. But we are not aware of any rule of law, upon which it can be traced into the land. There is no trust between Fort and Wilson, and the latter has violated none. Had Skeel so located the warrant, the case would have presented a different aspect. But Wilson is liable for the value of the warrant, which, to prevent litigation and circuity of action, the court can inquire into.

The decree of the District Court is affirmed, so far as it denies a recovery of the land; but the decree is reversed, so far as to let the complainant in to a recovery of the value of the land warrant, and the said court is directed to inquire into that value, and to render a decree in favor of the complainant for such value and interest, from the time of purchase.

DAVIS *v.* STEVENS.

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Parties may make time of the essence of a contract, and in such case, they must be held to a strict compliance in time, to the same extent as they are to any other essential part of the agreement.

Where a material averment in a bill in chancery is positively denied by the respondent, the testimony of one witness is not sufficient to overcome the answer. There must be something more than the oath of the witness, against that of the respondent.

Where an action to enforce the specific performance of a contract to sell and convey real estate, was brought upon a written contract, which provided that the respondent agreed to "sell and convey, by deed of special warranty, unto J. D. Davis, the (land, describing it), on condition, that said Davis pay promptly, time being of the essence of the contract, a certain promissory note, given September 17, 1853, calling for $270, payable September 17, 1854. If said note is not paid when due, I am privileged to enter upon and occupy said land, or to allow said Davis to do so, at my option, provided always that interest is paid on said note at the rate of ten per centum per annum. It is understood by the parties hereto, that the said Davis is to pay all taxes that may accrue on said land, and not to cut timber except for farming purposes. Then this bond to be carried into full effect, provided no pre-emption right attaches upon or vacates my present entry of said land," which bond was dated September 17, 1853; and where the bill alleged that before the note matured, the respondent made a verbal agreement with the complainant, by which the latter obtained an extension of the time of payment for six months beyond the time originally fixed by the contract, in consideration of which the complainant agreed to pay ten per cent. interest on the whole amount until paid; and also alleged a tender, on the 2d day of February, 1855, of the full amount of principal and interest due on said note, and a demand of a deed, which was refused; and where the answer admitted the making of the written contract, and the tender and demand for the deed; denied any subsequent contract for the extension of time, and any and all other matters alleged in the petition, and averred that the complainant having failed to pay the note at maturity, according to the

terms of the written contract, the respondent held said contract forfeited, and so declared said contract no longer in force; that he canceled the note, and claims nothing thereon; that he has, since the maturity of said contract, always been ready and willing to deliver said note to complainant, and that he brings the same into court to be delivered to him; to which no replication was filed; and where but one witness testified to the extension of time; *Held*, 1. That time was of the essence of the contract; 2. That the averment of the bill, that the time of payment was extended, was not sustained by sufficient proof, to entitle the complainant to relief.

Appeal from the Polk District Court.

THIS was a bill in chancery, praying the specific execution of a contract made by defendant to plaintiff, for the sale of a certain tract of land. The material parts of said contract are as follows: the defendant agreed to "sell and convey by deed of special warranty unto J. D. Davis, the (describing the land), on condition, that said Davis pay promptly, time being of the essence of the contract, a certain promissory note, given September 17th, 1853, calling for two hundred and seventy dollars, payable September 17th, 1854. If said note is not paid when due, I am privileged to enter upon and occupy said land, or to allow said Davis to do so, at my option, provided always, that interest is paid on said note at the rate of ten per centum per annum. It is understood by the parties hereto, that the said Davis is to pay all taxes that may accrue on said land, and not to cut timber, except for farming purposes. Then this bond to be carried into full effect, provided no pre-emption right attach upon or vacate my present entry of said land." This contract was dated September 17th, 1853, and delivered to plaintiff. The bill alleges, that before the note mentioned in the contract matured, the plaintiff called upon defendant, and then and there, by a verbal agreement, obtained an extension of time of payment for six months beyond the time originally fixed by the contract, in consideration of which, plaintiff agreed and undertook to pay ten per cent. interest on the whole amount until paid. He also avers a tender on the second day of February, 1855, of the full amount of principal and interest due on said note, and that he then

demanded a deed, which was refused. The defendant, in his answer, admits the making of the written agreement, but denies any subsequent contract for the extension of time, and any and all other matters alleged in the petition. He also alleges and avers, that the plaintiff having failed to pay the note at maturity, according to the terms of the written agreement, he (defendant) "held said contract forfeited, and all of the rights of the plaintiff thereunder, and so declared said contract no longer in force;" that he canceled the note, and claims nothing thereon; and that he has, since the maturity of said contract, always been ready and willing to deliver said note to plaintiff; and brings the same into court to be delivered to him.

To this answer, there was no replication. The case was heard on certain exhibits, depositions, and admissions, which show the following state of facts: There is no controversy, but that defendant made the original agreement, and it is also admitted, that plaintiff did, on the second of February, 1855, tender to the plaintiff the amount due on the note, and demanded a deed; and that defendant refused to receive the same, or make the deed, claiming that the bond was forfeited, and offering to give up the note. The money tendered was also brought into court, and tendered to defendant. Across a copy of the note attached to the pleadings, are written the following words: "canceled, bond forfeited, and note ready for delivery, upon return of bond." Defendant is a land agent and banker, and was engaged in the business of entering land on time. There is but one witness who testifies to the extension of time, and the substance of his testimony is contained in the following answers to interrogatories proposed to him on that subject. Witness asked defendant, if he was agoing to let plaintiff have the land, and defendant said, "that he had told plaintiff when he called on him, that he would write to the man who furnished the money to enter the land, to know if he would be willing for Mr. Davis to have the land, and that Mr. Davis became angry." At the same time, witness states, that defendant claimed that the land was forfeited. Witness also states,

that he asked defendant if he did not give plaintiff six months further time, to which defendant replied, "that he had frequently given further time; that he might have given Davis further time; or, that he had no doubt he gave him further time; but that he did not recollect that he gave him six months." These conversations took place in the winter or spring of 1855. One witness testified, that defendant told him that he had sold the land, but when is not shown. There is some testimony as to the manner in which defendant transacted business as land agent, but as it has no pertinency to the case, it need not be stated. There is no proof as to possession or improvements. On this state of facts, the court below decreed a specific performance of the contract, and from this decree defendant appeals.

Brown & Elwood, for the appellants.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—We do not think this decree can be sustained. The parties have by their agreement, made time of the essence of the contract. This it was entirely competent for them to do, and we have no right or power to make a different one for them. That time is of the essence, is not left to implication; but it is made so, by express stipulation. Under such a contract, parties must be held to strict compliance in time, to the same extent as they are to any other essential part of the agreement. *Young* v. *Daniels*, 2 Iowa, 156; *Taylor* v. *Longworth*, 14 Pet. 112. As if conscious of this rule, plaintiff places his claim to a specific performance, for the most part, upon the alleged agreement of defendant to extend the time of payment. Without taking time to consider the objection made by defendant, that this agreement is void, because it was not in writing, it is sufficient to say, that the testimony does not sustain the allegation, or rather, is not sufficient to overcome the positive denial made in the answer. In the first place, the testimony of the witness is by no means definite and clear, that de-

fendant ever extended the time, and least of all, six months. In the next place, he was not present at any negotiation between the parties, but the witness details what defendant said. This kind of testimony is always weak, and must be received with great caution. But a more conclusive view than either of the preceding is, that this testimony stands uncorroborated. No other witness is introduced, and no circumstance or circumstances are given, in support of the averment in the bill. Where a material averment in a complainant's bill in chancery, is positively denied by the respondent, as in this case, the testimony of one witness is not sufficient to overcome the answer. This rule is too familiar to the professional mind, to require more than its statement. There must be something more than the oath of the witness against that of the respondent. For these reasons, we conclude, that the averment in the bill, that the time was extended, is not sustained by sufficient proof, to entitle complainant to relief on this ground.

As shown in the statement, there was some testimony as to the manner in which defendant transacted his business. This testimony was not regarded as pertinent, and therefore, was not set out at length. This, perhaps, needs a word of explanation. Two or three witnesses speak of having had time extended to them on land contracts by the defendant, and of his custom requiring prompt payments. There is nothing, however, to show that either party to this contract acted in view of any such custom, or that plaintiff, at least, knew anything of it. There is no pretence that any general universal custom governing all contracts made by defendants, is shown, and under such circumstances, we regard all such proof immaterial.

The decree below is reversed, and cause remanded, with instructions to the court below to dismiss the bill.

DAVIS *et al.* *v.* MILBURN.

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Courts of equity follow the law in regard to matters of set-off, unless there is some intervening equity going beyond the statute of set-off, which constitutes the basis of set-off at law.

Such natural equity arises when there are mutual credits between the parties, or where there is an existing debt on one side, which constitutes the ground of a credit on the other, or where there is an express or implied understanding that the mutual debts shall be a satisfaction or set-off *pro tanto* between the parties.

The mere existence of distinct debts, without mutual credit, will not give a right of set-off in equity.

In the case of mutual debts in the same right, as mutual joint debts, or mutual separate debts, the insolvency of either party, will entitle the other, in equity, to set off his debt against the debt of the insolvent, without any other intervening equity.

Where there is some new equity to justify it, as fraud, or where the party seeking relief, is only surety for a debt, really separate, joint and separate debts may be set off in equity.

Where no special equities intervene, a court of equity will not refuse relief by way of set-off, on the ground that the claim sought to be set off is unliquidated; but will allow the complainant to have the damages ascertained, and when so ascertained, allow the same to be set off *pro tanto* against the claim of the other party.

An assignment of a chose in action conveys merely the rights which the assignor then possesses in the thing assigned; but such an assignment does not necessarily draw after it all equities of an independent nature.

The mere fact that a set-off would be in conformity with the principles of natural equity and justice, is not sufficient, of itself, to bring the set-off within the jurisdiction of a court of equity; and even where there are mutual debts, which may be set off in equity, the right of set-off is extinguished by a *bona fide* assignment of one of the debts.

Appeal from the Van Buren District Court.

THE complainants filed their bill in chancery, praying an injunction to stay proceedings on a judgment, in the name of Milburn, against complainants, rendered October 29th, 1853, for $3,500, in Jefferson county. The suit in which judgment was rendered, was brought upon an attachment bond, executed by Davis, in favor of Milburn, in which Shepperd and Wayne were sureties, and the damages received on the bond, were for the wrongful suing out the

attachment by Davis, and levying on the property of Milburn. The petition alleges, that the sum of $2,524, has been paid on the judgment by Davis, since the rendition thereof; and that Milburn is justly indebted to Davis in an amount exceeding the balance due on the judgment against complainants, all of which was due and owing at the time of the rendition of the same, and on which, suit has been brought by Davis against Milburn in the District Court of Van Buren county, claiming ten thousand dollars damages, which action will be for trial at the next succeeding term of the District Court of said county. The petition further alleges, that complainant Davis, in the suit in which the judgment against him was rendered, sought to set off the said indebtedness of Milburn to Davis, against Milburn's claim for damages against complainants, but he was not permitted so to do by the court; that Milburn is totally insolvent, and has no property, except the judgment aforesaid, and prays that there may be an injunction against the execution of said judgment, until the termination and adjudication of the suit pending against said Milburn, on the complainant Davis's aforesaid causes of action; and that whatever judgment the said Davis may recover against said Milburn, in the suit, may be applied as a set-off against, and in payment of the balance due on the judgment of Milburn against complainants. The petition further shows as a reason why the injunction should be granted, that one Jesse Wear had commenced an action of attachment against Milburn, for about the sum of five hundred dollars, in the District Court of Jefferson county, in which suit a process of garnishment had been served on complainants, requiring them not to pay any sum of money due from them to said Milburn, to him, until the further order of the court, or the final adjudication of the said suit of Wear *vs.* Milburn; and that the same is still undetermined. The injunction was allowed by the judge of the District Court, and all proceedings on the judgment and execution stayed. On the allegation of complainants, that Milburn was a non-resident of the state, notice of the pendency of the suit was ordered by

the court, to be served on the attorneys of Milburn, in the suit in which judgment was recovered, and the notice was served accordingly.

John Winsell afterwards filed his statement under oath, that on the 1st of May, 1854, the balance due on the judgment against complainants, had been assigned to him by Milburn, for a valuable consideration, and in good faith; that the written assignment had been filed and recorded in the office of the clerk of the court in which the judgment was rendered; th .t from the 1st day of May, 1854, the said Winsell had been the owner of the judgment, in good faith; that he had caused the execution to issue, which is prayed to be enjoined; and that Milburn had no interest in the same. At the same time, Augustus Hall, attorney for Milburn, in said suit, filed his statement under oath, setting forth that by special agreement with Milburn, he was to have five hundred dollars, of said judgment of Milburn against complainants; that the Supreme Court of the state had, by special order, given him a lien upon said judgment, for five hundred dollars; that the execution enjoined was indorsed with said order of the Supreme Court; and that one hundred and sixty dollars of said amount has been paid, and a balance of three hundred and fifty dollars, remains due to said Hall. On motion, the said Winsell and Hall were made parties defendant to the plaintiff's petition, and their statements and answers being filed as aforesaid, they moved the court to dissolve the injunction. The motion being heard, was overruled, to which decision of the court in refusing to dissolve the injunction, the said Winsell and Hall except, and they appeal to this court.

C. C. Nourse, for the appellants.

Knapp & Caldwell, for the appellees.

STOCKTON, J.(1)—The complainants allege, as the ground

(1) WRIGHT, C. J., having been of counsel, took no part in the decision of this cause.

of their claim for set-off against the defendant Milburn, that he is insolvent; that Davis, one of the complainants, and the principal in the judgment sought to be enjoined, has large claims against him unpaid and unsatisfied, on which he has commenced suit, claiming to recover a large amount; that the suit is undetermined, but will be for trial at the next term of the District Court of Van Buren county; and complainants pray that when such judgments may be obtained by said Davis, he may be allowed to set off so much of the same as may be necessary to pay and satisfy the judgment of defendant Milburn, against them; and in the meantime, and until such judgment is recovered, that Milburn may be enjoined from executing his said judgment, an execution issued on which has been levied on the property of petitioners, Mayne and Shepperd, they being only the sureties of Davis, for the payment of the damages, recovered against him by Milburn. It is further alleged by complainants, that they were prevented by the District Court, from setting off the said indebtedness of Milburn to Davis, in the suit in which the judgment against them was recovered by the strict rules of the common law, and because the said claims were in different rights.

The known rule of courts of equity is, that they follow the law in regard to matters of set-off, unless there is some intervening equity going beyond the statute of set-off, which constitutes the basis of set-off at law. Such natural equity arises where there are mutual credits between the parties; or where there is an existing debt on one side, which constitutes the ground of a credit on the other; or where there is an express or implied understanding, that the mutual debts shall be a satisfaction or set-off, *pro tanto*, between the parties. *Howe* v. *Shepperd*, 2 Sumner, 412. It is said by Judge Story (2 Story Eq. Juris. § 1435), that by *mutual credit*, in the sense in which the term is here used, we are to understand a knowledge in both sides of an existing debt, due to one party, founded on and trusting such debt as a means of discharging it. The mere existence of distinct debts, without mutual credit, will not give a right of set-off

in equity. Whether in a case of mutual debts, in the same right, as, for example, mutual joint debts, or mutual seperate debts, the insolvency of either party would entitle the other to set off his debt against the debt of the insolvent party, without any other intervening equity, seems at one time to have been doubted in England. 1 Atkins' Rep. 231. The doctrine, however, seems to be well established in this country, and courts of equity have entertained the jurisdiction of cases of set-off, when there has been an obstacle to the complainant's proceeding at law, who seeks to set off his claim, such as insolvency, non-residence, or the like. *Tribble* v. *Taul*, 7 Monroe, 457; *Simson* v. *Hart*, 14 Johnson, 63; *Talbot* v. *Warfield*, 3 J. J. Mar. 86; *Buckmaster* v. *Grund*, 3 Gilman, 626. And although courts of equity have held that joint and separate debts cannot be set off against each other in equity, any more than at law (*Date* v. *Cooke*, 4 Johnson Ch. 11; *Jackson* v. *Robertson*, 3 Mason, 138), yet it has been held, that where there is some new equity to justify it, there may be such set-off. And such equity may arise under circumstances of fraud, or where the party seeking relief, *is only a surety for a debt really separate.* *Green* v. *Darling*, 5 Mason, 209; *Jackson* v. *Roberson*, 3 Ib. 145; 2 Story's Eq. Jurisprudence, § 1437.

So far, we do not see that the objection to the relief asked by complainants can be resisted, on the ground that the claim sought to be set off did not arise from mutual credits given by the parties to each other, or are not cognizable in equity. It is further objected to the relief sought by complainants, that the demands against Milburn sought by them to be set off against the judgment, have not been settled and liquidated at law; and that where they are uncertain and unliquidated, they are not the proper subject of a set-off in equity, any more than at law. The petition alleges, that the said Milburn is indebted to the said Davis in large sums of money, to wit, in the sum of five thousand dollars, of which, six hundred and twenty-seven dollars, is due on a contract between Davis and Milburn, about the cutting of timber and saw logs on Davis's land; two hundred and sixty

dollars, for judgments obtained before a justice of the peace of Van Buren county; ninety-eight dollars, for an account assigned to Davis, by one Pfouts of said county; two hundred dollars, for other just claims; and for the rent of a mill and distillery for the term of two years and three months, at fifteen dollars per day; and that suits for the recovery of these claims, are pending and undecided.

We do not know that this objection, that the claims of Davis are unliquidated, would of itself be sufficient to defeat the complainants' right to relief; although the doctrine contended for by defendant's counsel, is well established by the authorities cited, and others. See *Livingston* v. *Livingston*, 4 Johnson C. 286; *Derman* v. *Lyon*, 3 Ib. 351; *Parkinson* v. *Prousdall*, 3 Scammon, 370; *Batterman* v. *Pierce*, 3 Hill, 174; *Patrick* v. *Livingston*, 3 J. J. Mar. 655.

In *Jones* v. *Waggoner*, 7 J. J. Mar. 147, it is held, that where the chancellor has jurisdiction of a case by injunction, or otherwise, he will do justice between the parties; and the insolvency of the defendant, being admitted, he will decree as a set-off against the judgment at law, damages growing out of a breach of covenant, and the same being fixed by the contract and the law, he will assess them. We are inclined to the opinion, that in such a case as the present, where no other special equities intervene, the court should not deny the relief, on the ground, that the damages are not ascertained, but allow the complainants to have the damages of Davis ascertained, and when ascertained, allow the same to be set off *pro tanto*, against the judgment of Milburn. If there were no other equity interposing, we should be disposed to sustain the injunction granted to complainants. The case presented in this petition is, *prima facie*, sufficient to entitle them to the relief sought.

Let us see how the case stands, in the aspect in which it is presented by the petition of Winsell. He became the assignee of the balance due on the judgment in good faith, for a valuable consideration, and without any notice or knowledge of the matters charged in the complainants' petition, as existing between Davis and Milburn, on the 1st

May, 1854. It is claimed that the judgment was not assignable at common law, and has not been made so by the Code; and that the assignee takes it subject to all the equities, existing between the original parties to the judgment itself. If this were true in the full sense claimed by complainants, that is very different from admitting that he takes it subject to all equities subsisting between the parties, as to other transactions. There is a wide distinction between the cases. An assignment of a chose in action, conveys merely the rights which the assignor then possesses to that thing. But such an assignment does not necessarily draw after it, all equities of an independent nature. *Greene* v. *Dailey*, 5 Mason, 214; *Murray* v. *Lilburn*, 2 John. C. 442. In the case of *Makpeace* v. *Coats*, 8 Mass. 451, the Supreme Court of Massachusetts refused to permit one judgment to be set off against another, between the same parties, when it appeared that persons, other than the nominal creditor, were interested by assignment of the demand, on which one of the judgments was rendered. In *Merrill* v. *Souther*, 6 Dana, 305, the Court of Appeals of Kentucky, held, that where an insolvent debtor in a judgment, obtained a smaller judgment, against the plaintiff, the latter has, *eo instanti*, an equitable right to set off his judgment against it; and the former cannot deprive him of his right, by assigning his judgment. The assignee takes only an equity, and his equity is inferior to the equity of the plaintiff. See also *Robbins* v. *Holley*, 1 Mon. 191. The right of set-off here, became absolute as soon as the latter judgment was obtained.

In the present case, the facts, which give to the complainants, the right to come into a court of equity, to seek to enforce the set-off not permitted at law, are the alleged insolvency of Milburn, and his absence from the state. The petition, however, does not state, nor are we elsewhere informed, at what time his insolvency or absence commenced, nor whether, it existed at the time of the judgment, or before the assignment to Winsell or not. It appears that he was absent and insolvent at the time of the bill filed; but how long before does not appear, and particularly does it

not appear, whether such alleged insolvency and absence, existed before the rights of Winsell accrued. The right of the complainants to set off the claims of Davis against the judgment of Milburn, did not exist *eo instanti*, with the rendition of the judgment against them. The mere fact, that such set-off would have been in conformity with the principles of natural equity and justice, is not sufficient, of itself, to bring it within the jurisdiction of a court of equity; and even where there are mutual debts, which may be set off in equity, the right of set-off is extinguished by a *bona fide* assignment of one of the debts. *Howe* v. *Shepperd*, 2 Sumner, 411. Before the application in this case for a set-off, all the right of Milburn in the judgment against Davis, had been assigned to Winsell, and the equity of Winsell is both fair in point of time, and better in point of right, than that of complainants in regard to the judgment.

On the case made by the petition, and the answer of Winsell, we think the District Court erred in refusing to dissolve the injunction. Winsell, as a *bona fide* assignee of the judgment, for a valuable consideration, and without any notice of the equity alleged in complainants' petition, is entitled to collect the balance of the judgment, unless the aspect of the case is changed by the testimony, and by other facts not now presented by the record.

We have omitted any mention of the matters presented by the answer of Hall, because, as we gather from the statement of Winsell, there is no disagreement between himself and Hall, as to the claim for attorney's fees. So also have we omitted any notice of the aspect of the case presented by the garnishee process of Jesse Wear. It is not stated when the notice to appear and answer as garnishees, was served on complainants, nor does it appear that it was before the assignment of the judgment to Winsell. The complainants' petition was filed March 12, 1855, in which it is stated, that they are requested to answer as garnishees at the next term of the District Court of Jefferson county. The assignment to Winsell was May 1st, 1854, and we do not see, but that complainants would be able to protect themselves by their

answer as garnishees, from all liability or danger of being required to pay the amount due on the judgment twice over.

The order of the District Court overruling the motion to dissolve the injunction, is reversed, and the cause is remanded with directions to dissolve the injunction, unless complainants shall strengthen the equitable grounds for continuing the same, by showing other facts, not now before us, either by amended petition, or replication to defendant Winsell's answer.

Judgment reversed.

FREDERICK *v.* COOPER *et al.*

Where articles of copartnership between a father and his two sons, provided, that the father is to be charged with fifty dollars for each and every year, commencing the first of August, 1847, to be deducted out of his share of the dividend on the final settlement, unless he furnish labor to that amount at his own expense, and if from infirmity of old age, or if said father shall feel inclined to withdraw from attending to the affairs of the firm at the expiration of two years, one hundred dollars for each year shall be charged to him, and deducted out of his share, as above stated.

Held, 1. That the respective sums of fifty and one hundred dollars per year, were in lieu of the labor and care of the father as a partner, and to pay for them; that he could not share in these sums as a partner; and that he was entitled to share in the increase or profit created by the labor which the money furnished.

2. That if the father did not actually pay these sums, or such of them as were payable, he was to be charged with them, and *interest*, but not with the *profit* of them.

And where such articles of copartnership provided, that should the company be closed before the term specified (five years), the two sons should each only be entitled to no more than one hundred dollars of the capital stock, for each and every year of the existence of the company: *Held*, that each of the sons were entitled to the one hundred dollars per annum, and to their respective shares of the increase of those sums.

Where articles of copartnership, which were dated November 20, 1847, and which provided that the copartnership should continue for five years from and after the first day of August, 1847, recited that the partnership had

been made verbally about the 20th of April, 1846, and actually commenced at that time; *Held*, That the previous parol agreement was to be taken as the same in terms with the written; that the written articles must govern as to the duration of the partnership, and the interest of the partners; and that whatever was invested in the partnership business, prior to the writing, must be regarded as belonging to the firm under the written articles.

Where a bill in equity by the surviving partner, against the personal representatives and the heirs at law of the deceased partner, to settle up the partnership business, which business related to both personal and real estate, alleged that on the 20th of April, 1846, the petitioner entered into a verbal contract with J. F. and J. S. F. for the formation of a partnership to engage in the purchase of lands and farming, that after they had so engaged in said business, to wit: on the 20th of November, 1847, they reduced the said agreement to writing; that by said agreement, J. F. was to furnish and put into said firm as capital, $2,000, to buy lands, live stock, and farming utensils of various descriptions; that J. S. F. and petitioner were to devote their time and best endeavors to promote the interests of the company; that J. F. should have one-half of the property owned by said company, and J. S. F. and petitioner, each one-fourth, which was the basis upon which a division of the assets of the company was to be made at the expiration of the company; that the business was to be conducted in the usual way of conducting farming, &c.; that by virtue of said agreement, J. F. entered and purchased certain lands in Polk county (describing them); that the said company made large and valuable improvements on the same; that in April, 1849, J. S. F. sold his interest in the firm to J. F. and left the country; that the lands were entered in the name of J. F., who held the title at the time of his death; that from the time of making the said verbal agreement until the first of October, 1850, the petitioner continued to work on said lands, and gave his sole attention to the affairs of the company; that at the time last named, in pursuance to notice to that effect, as provided for in the agreement, the affairs of said company were closed; that before this, to wit: in June, 1850, by agreement between J. F. and petitioner, a certain portion of the lands were surveyed, and understood between them, as that which petitioner was to have as a portion of his share of said lands, which said lands were as follows (describing them); that in pursuance of such agreement, petitioner built a house and made other improvements thereon, in the expectation that when the division took place, he would get said land; that he moved into said house, where he still resides; that petitioner and J. F. had a full settlement and division of all the personal property belonging to the company, with exceptions, which are mentioned; that petitioner and J. F. were unable to agree and settle with regard to a division of said lands first described; that J. F. at the time of said settlement, admitted that petitioner was entitled to, and ought to have, as portion of his share, the lands described, on which he was then building the house, &c.; that J. F. died on the 6th of May, 1852, never having conveyed said lands, or any part thereof, to petitioner; that petitioner performed every part of his agreement of partnership; that the executors and heirs at law of the said J. F.

have neglected and refused to divide the property and settle the partnership business, according to, and in the manner pointed out by, the articles of copartnership, &c., to which bill there was a demurrer on various grounds, which was sustained by the court, and the bill dismissed.

Held, 1. That inasmuch as the bill stated the amount of capital stock furnished by each partner, it laid a sufficient basis on which to proceed.

2. That if the deceased partner furnished more capital after the commencement of the partnership, his representatives might show the fact, and the bill was not defective because it did not state whether he did or not.

3. That the fact that the lands were purchased in the name of J. F. was no bar, after his death, to the claim of the complainant.

4. That the contract of partnership being in writing, signed by the parties, and containing all the essential matters which could, in the nature of things, be specified, and the land and other property to be bought and used, being to be determined in the future, the objects to which the contract applied might be pointed out by evidence, without any violation of the rules of law in relation to written contracts, or to contracts concerning land.

5. That the complainant's cause, taken together, could not be conducted in the county court.

6. That sections 1362 and 1363 of the Code, present no obstacle to the prosecution of the suit in the District Court.

7. That in making the personal representatives and the heirs at law of the deceased partner, parties to the suit, there was no misjoinder of parties.

8. That the averment in the bill, that the heirs and representatives of the deceased partner, had refused to settle up the business, and divide the property, in the manner specified in the articles of copartnership, gave a sufficient reason for applying to the court to settle the partnership.

9. That the bill disclosed matter upon which the District Court could act, and over which it possessed original jurisdiction.

In a suit in equity to settle up a partnership, where one of the partners is deceased, and where the firm owns real estate, the personal representatives and heirs at law, of the deceased partner, are proper parties to the bill.

A surviving partner may take the affairs of the firm into his own hands, and settle them; but this does not cover the case of a deceased partner, who is indebted to the firm; nor does it preclude the survivor from looking to the estate of the deceased debtor partner.

The county court possesses no jurisdiction over a bill to enforce the specific performance of a contract; nor over a bill in equity, to settle the affairs of a partnership.

Appeal from the Polk District Court.

THIS is a bill in equity, commenced by Benjamin F. Frederick, as surviving partner, against the personal representatives and heirs at law of Jacob Frederick, deceased. The bill alleges that on or about the 20th of April, 1846,

the petitioner entered into a verbal contract with Jacob Frederick (his father), and John S. Frederick (his brother), for the formation of a partnership or joint company, to engage in the purchase of land and farming the same; and that subsequently, and after they had engaged in said business, to wit: on the 20th day of November, 1847, they reduced their said agreement to writing, which said agreement read as follows:

"Article of agreement and association made and entered into, this twentieth day of November, in the year of our Lord one thousand eight hundred and forty-seven, (having been heretofore verbally made about the twentieth of April, 1846), by and between Jacob Frederick and his two sons, John S. Frederick and B. Franklin Frederick, whereby it is agreed as follows: that is, the parties to this agreement have agreed to unite their joint labors, together with such capital stock as is hereinafter specified, for the purpose of making and improving a farm, or several farms, on the waters of Four Mile creek, in Polk county, Iowa, or elsewhere, as circumstances may appear to require, or the company be enabled to do, to farm the land which may be purchased, or cause the same to be done, in all the various branches of farming, necessary and proper to be done, and to the raising of stock of the various kinds which may appear necessary and profitable, such as horses, cattle, and hogs and sheep. The said Jacob on his part, agrees to furnish a capital stock of two thousand dollars, for the use and benefit of the company, including such expenditures as have already been made for the benefit of the company; said capital stock is understood to consist of money to buy lands and other expenditures necessary and proper, and live stock, and farming utensils of the various descriptions, and also carpenter tools, all at a fair valuation, a memorandum of which is hereafter to be made out; and each of the parties to have a copy. Said Jacob further agrees that the company shall have the use and benefit of his flock of sheep, consisting of two hundred and forty head, the increase and fleeces of the present season, and whatever may accrue hereafter, to be

the property of the company, the company to return to said Jacob, two hundred and thirty at the expiration of the firm. Any property which either said John or said Franklin may have of their own, which may be used by the company as common property, each may make out his account against the company, at a fair cash valuation, and at the closing of the concerns of the company, each shall be entitled to receive an equivalent in a similar description of property, with interest. This company shall continue for and during the term of five years, from and after the first day of August, eighteen hundred and forty-seven, unless dissolved as hereinafter provided. So soon as said Jacob pays two thousand dollars, as before specified, he is to charge each, said John and said Franklin, with five hundred (500) dollars, as so much of their legacy, without interest. At the expiration of the term before mentioned, the property of all descriptions belonging to the company, is to be divided, lands, money, and all other property, as follows: said Jacob is to have one-half; said John and said Franklin each to have one-fourth. In order to come at a proper division, or as nearly so as practicable, the purchase by the company to be divided into such tracts as may be most appropriate; the money and sheep to be divided by numbers, and such other stock as will be found proper to divide, in the same way. The lands and other property to be estimated by each of the parties at a money valuation; each one to estimate for himself, and set the sums down in writing; the estimate made by said Jacob to be doubled, and the several estimates to be added together, and divided by four, which is to be taken as the true value. Any property which the company may think advisable, may be sold at auction. Said Jacob is to be charged with fifty dollars for each and every year, commencing the first of August, 1847, to be deducted out of his share of the dividend on the final settlement, unless he furnish labor to that amount, at his own expense, and if from infirmity of old age, or if said Jacob should feel inclined to withdraw from attending to the affairs of the firm at the expiration of two years, one hundred dollars for each

year shall be charged to him, and deducted out of his share as above stated. Each individual forming this company, shall charge himself with all the money by him received in behalf of the firm, and charge the company with all he may pay for the use and benefit of the firm; and any money or property intended for individual use, shall be charged accordingly. If either said John or said Franklin, or both, should be disposed to withdraw and close the concerns of the company, they are at liberty to do so, by giving six months' notice. In all cases where the affairs of the company are closed, and a distribution of the property made, it shall be done about the first of August. Should the company be closed before the term specified, the said John and Franklin shall not be entitled to more than one hundred dollars each, of the capital stock, for each and every year of the existence of the company, and to be charged accordingly. That sum, together with all the increase, value of improvements, and other property, shall be divided as before stated. As the duration of life is always uncertain, should any of the company die, his surviving friends, or a justice of the peace, shall appoint one or more judicious, disinterested person or persons, to act in his stead, in making the distribution of property in conformity with the terms before stated.

"It is fully understood, that during the continuance of the company, said Jacob shall be entitled to one-half of the proceeds of the company for subsistence and clothing, himself and family; the meaning of this is, that it shall be no more than is necessary for that purpose; and in like manner said John and said Franklin, shall each be entitled to one-fourth of the proceeds, the residue of the proceeds to be disposed of for the benefit of the company. No one of the company shall use money, or other property, for individual speculation, without the consent of the others. In case said Jacob may have at any time money of his own during the continuance of the company, and in case said John and Franklin should think it advisable to use more money than the two thousand dollars before specified, to

buy lands or sheep for the benefit of the company; in that case the company will be required to refund and pay to said Jacob, any sum over and above the two thousand dollars, together with eight per cent. interest per annum, when the value on the various descriptions of property is fixed, by the rule before stated. Should more than one of the company wish to have the same property, it shall be set off to the one that is willing to pay the most. Should said Jacob, at any time wish to take twelve sheep from the stock, he has a right to do so, and any such number is to be deducted out of the number to be returned to said Jacob. Each of the parties agrees for himself, to use due diligence and his best endeavors, to promote the best interest of the company; to see that as little as possible be lost by carelessness or neglect; and to use his best judgment in buying and selling and making bargains in general.

"In testimony whereof, and for the faithful performance of the foregoing stipulations, we have hereunto subscribed our names the day and date above written. This company to be known by the name of Frederick & Sons.

Signed triplicate, { JACOB FREDERICK,
JOHN S. FREDERICK,
BENJAMIN F. FREDERICK."

The bill further represents, that about the time of making the said verbal contract, they commenced work together under and by virtue of said contract, and that the said written contract is the one which evidences the terms and character of their said joint undertaking; that by virtue of said agreement, the said Jacob entered and purchased the following parcels of real estate, situate in the county of Polk, to wit: lots seven, eight, nine and ten, and the southeast quarter of section five; the southeast quarter, the south half, and lots one to twelve, inclusive, of section four, in township 78, range 23 west; and the southeast quarter of section 34, in township 79, range 23 west; that on the said lands the said company made large and valuable improvements, in the way of building houses, fencing, breaking prairie, and all other work usual and customary in the improvement of farms;

that at the time of the dissolution of said company, as hereinafter mentioned, there were about one hundred and three acres fenced and in cultivation, three houses and various stables and out-buildings erected, and an orchard set out—all of which was done by the joint labor of said company; and that in April, 1849, the said John S. Frederick sold to the said Jacob, all his right, title, and interest in said company, and went to California.

The bill further represents, that all of said lands were entered in the name of the said Jacob, and the title remained in him at the time of his death; that from about the time of making said verbal agreement until the 1st of October, 1850, the petitioner continued to work said lands, and gave his sole attention to the best interests of said company; that at that time, in pursuance to notice given by the said Jacob, as provided for in said articles, and by mutual consent, the affairs of said company were closed; that before this, to wit: in the month of June, 1850, by agreement between the said Jacob and petitioner, a certain parcel of said lands were surveyed and set apart, and understood between them, as that which petitioner was to have as a portion of his share of said lands (which said parcel of land is described in the petition), making 177 21-100 acres; that in pursuance of that agreement and understanding, the petitioner proceeded to build a house, and make other improvements thereon, and that he moved into and still resides in the said house.

The bill further represents, that in October, 1851, when the business of said company was closed, the said Jacob and petitioner had a full settlement and division of all the personal property belonging to said company, so far as petitioner's share was concerned, except the amount coming to him for his portion of the wool for that season; the fifty dollars for each year from the first of August, 1847, as specified in said agreement, if the said Jacob did not perform that amount of labor; and one other item hereinafter mentioned; that petitioner received his portion of the personal property, with the above exceptions; that at the time of said division, they were unable to agree and settle with regard to the divi-

sion of the said real estate; that no settlement was made in relation thereto; that the said Jacob died on the 6th of May, 1852, without making to petitioner any conveyance of said lands; and that petitioner is the equitable owner of one-fourth of said lands.

The bill further represents, that the petitioner kept each and every part of the said agreement; that he gave all his attention to the business of said company; that at the time of the said Jacob's death, there was due petitioner the sum of $159, with interest from October 1st, 1850, as the amount of the fifty dollars which petitioner was to have each year, or which was to be charged each year to the said Jacob, commencing on the 1st of August, 1847, unless the said Jacob should furnish labor to that amount at his own expense; that such labor to that amount, or any part thereof, was not so furnished by the said Jacob, at his own expense; that there is due and owing to the petitioner from the estate of the said Jacob, the sum of three hundred and fifty dollars, under and by virtue of that part of said agreement, which provides that petitioner and the said Jacob, were each to have one hundred dollars each year from the capital stock, which was not settled at their settlement in October, 1850; that before said settlement, the said Jacob sold to one C. D. Reinking, a portion of a claim which originally belonged to the company, for fifty dollars; that after the settlement, the said Jacob received said fifty dollars, which belonged to the company; that petitioner is entitled to one-fourth of that sum; and that the said Jacob made a last will and testament, which has been duly admitted to probate. The bill then sets out the names of the executors and heirs at law of the said Jacob, and makes them party defendants; avers that complainant has frequently endeavored to have the executors and heirs of the said Jacob settle the claims of petitioner against the estate, and that they have refused so to do; and prays for the necessary relief.

To this bill the defendants filed a demurrer, alleging as causes thereof, the following:

1. The petition shows an unsettled partnership account,

but does not show the amount of capital stock furnished by each of said parties, nor the amount which each partner expended in carrying on the partnership business, and what each received therefrom.

2. It does not show the interest of the several parties, nor the mode and manner of conducting the business, or fix any basis upon which the court can decree an account and settlement of the partnership business.

3. The petition discloses no matter upon which this court can act, or over which it has original jurisdiction.

4. The supposed verbal contract in relation to the partition of said lands, or the setting off to plaintiff said lands, upon which he claims to have made improvements, not having been executed before the death of Jacob, said lands became and was at the death of said Jacob, assets of his estate, the same as any other lands owned by him.

5. The petition discloses no contract or agreement upon which this court can decree a specific performance against the said defendants.

6. That the plaintiff can only prosecute his claim in the county court.

7. There is an apparent misjoinder of matter of equity in relation to real estate, and the enforcement of a supposed contract for lands, and an account, the latter of which this court has no original jurisdiction of, as against the estates of deceased persons.

8. The petition claims the specific performance of a contract in relation to lands, and also an account, which claims are inconsistent, and cannot be joined in the same action.

9. The parties to said partnership in these articles, have agreed upon the tribunal or forum by which said partnership business was to be settled; and said petition gives no reason for applying to this court, and invoking its aid, in settling said partnership.

The demurrer was sustained, and a decree rendered dismissing the bill, at the cost of the complainant, from which he appeals.

J. E. Jewett, for the appellant.

J. Parrish and *Bates & Finch*, for the appellees.

WOODWARD, J.—In April, 1846, the complainant, with his father, Jacob Frederick, and his brother, John S., entered into a verbal agreement of partnership. On the 20th November, 1847, this agreement was reduced to writing and signed by them. Their business was the purchase of lands, and the carrying on of husbandry, in any and all of its departments, as they should see fit. The partnership was to continue five years, from the first of August, 1847. In order to arrive at the questions in the cause, and our views upon them, it is necessary to have a construction of the articles of partnership, so far at least as they bear upon the present cause. The partnership actually commenced, under a parol agreement, in April, 1846, which is recognized in the written articles of November 20th, 1847. The previous parol agreement is to be taken as the same in terms with the written. But the written one is to be regarded as commencing again. Therefore the written articles must govern as to duration, and the interest of the parties, whilst, at the same time, whatever was invested in the partnership business prior to the writing, must be regarded as belonging to the firm, under the articles.

The father, Jacob, was to furnish two thousand dollars, to be invested in lands, stock and implements. The sons were to be charged five hundred dollars each, to be taken from their inheritance in the father's estate. The father holds two shares in the concern, to one share each in the two sons. The sons are to give their time, labor, and attention. The father also is to give labor and attention to the common interest. If he does not render at least fifty dollars worth of labor each year, he is to pay that sum each year; and if he withdraws altogether from labor and attention to the common concerns, he is to pay one hundred dollars for each year. He is not to share this fifty or one hundred dollars per annum, because if he does not give this labor and

attention, it is to be found elsewhere; and these sums are supposed to purchase, or to pay for them.

The five hundred dollars to be charged to each of the sons, is one hundred for each year of the duration of the firm. Therefore it is provided, that, if the firm ceases before the expiration of the five years, they shall be entitled to but one hundred each for each year, out of the capital stock. Then comes this question. If the firm continues the five years, and the capital stock, whether in lands, or otherwise, increases in value, in what proportions are the sons to take? Are they to have their five hundred dollars only, or are they to have in the proportion which that sum bears to the investment? We say, in the latter proportion. This sum is charged to them, to be taken from their inheritance. It is an advancement by the father. It is an investment by them in the partnership, and in the increase of it, they are entitled to their respective shares. Their care, attention, and labor, has made the increase, so far as any such instrumentalities have done it. In effect, then, the father invests one thousand dollars, and each son five hundred. Beside this, all are to give care and labor, but the sons principally. If the father does not, he pays money. No other capital than this is required, and if any one puts in anything more, he is to have credit. Each may draw on the proceeds, or increase, for his subsistence. In a division, the father is to have two shares, and each son one share. Property which can be divided by number, is to be so divided. Other property, as land, for instance, is to be divided in manner following; each is to make his estimate; then the father's is to be doubled; and then the sum of all these sums is to be divided by four, and the result taken for the value. And should more than one desire the same piece of property, he who will pay the most, shall have it. This is more especially applicable to the realty. Thus far, we suppose the firm to continue regularly the period of its limitation. We come now to the provisions relating to a premature dissolution.

If either, or both, of the sons, desires to withdraw before

the expiration of the limitation, he or they may do so, on giving six months' notice; and should the firm be closed before the time limited, the sons are entitled to but one hundred dollars each of the capital stock, for each year of the existence of the company. That is, and this means, one hundred dollars of the original investment, but this carrying with it, its due proportion of the profit or increase; for theirs was an investment as much as the father's; and besides, if they are not allowed the increase, then in case of a premature dissolution, the father takes all the increase, and they the investment only. This might be; but there is nothing in this case to lead to so harsh a conclusion. This construction is consistent with the thought before suggested, that the father makes an advancement of five hundred dollars in a partnership, which is to continue for five years; and now we see that if that partnership ceases before the five years, the sons are to have only at the rate of one hundred dollars for each year.

The cause stands before us on demurrer, and we arrive now at the allegations of the bill. The partnership went on until April, 1849, when John S. sold all his right, title, and interest in the firm, to the father, withdrew from the concern, and went to California. He then has no further interest, and we set him out of view. But it appears that the partnership went on between the father, Jacob, and Benjamin P., the other son. Technically, the first partnership was dissolved. But it does not follow, as of course, that the whole affair must be, or was, wound up. The bill alleges that John sold all his interest to his father, and it is fairly inferable, though not alleged in express terms, that the father and Benjamin continued on together as before. Such being the case, they tacitly agree to continue the partnership, with themselves alone as partners. The first effect now is, that the father has an interest of three-fourths, and Benjamin his original one-fourth. The thought that the whole matter has stopped, and there is now no partnership at all, cannot be accepted. This would commit a fraud upon Benjamin. It must be understood that he and his father

went on together; and he alleges that he continued, after John's withdrawal, till the 1st October, 1850, to work said land, and to give his sole attention to the best interest of said company. He then avers that at the date last mentioned, in pursuance of notice given by the said Jacob to him, and by mutual consent, the affairs of said company were closed; that he and the said Jacob had a full settlement and division of all the personal property belonging to the said company, so far as petitioner's share was concerned (except as afterwards mentioned), and that they settled their accounts of money, and property paid in and out by each. The exceptions referred to are, the claim of fifty dollars a year for labor, his share in the clip of wool for that year (1850), the one hundred dollars a year in the capital stock, and his share in a "claim" sold to C. D. Reinking for fifty dollars. All this shows (on demurrer), that the partnership went on between Benjamin and his father; and it shows further, that all claims as to the personalty were settled, except those specified, leaving open only those named as to personalty, and the broader claim on the land, on which they had not agreed when the death of the father occurred, on the 6th of May, 1852.

Let us examine these claims on the personalty. The provision of the original articles as to the fifty and the hundred dollars, is as follows: "Said Jacob is to be charged with fifty dollars for each and every year, commencing the first of August, 1847, to be deducted out of his share of the dividend on the final settlement, unless he furnish labor to that amount at his own expense; and if from infirmity of old age, or if said Jacob should feel inclined to withdraw from attending to the affairs of the firm at the expiration of two years, one hundred dollars for each year shall be charged to him, and deducted out of his share as above stated." Bad grammar does not make bad pleading. The meaning is evident, that the father is to pay fifty dollars each year, unless he furnish labor to that amount, and that he may withdraw altogether after two years, paying one hundred dollars each year. These sums are to be deducted from his

share of the dividend. The question naturally arises, whether these sums or payments are of such a character that he may share in them as a partner. We think not. The partners in fact, contribute equally to the capital stock, and are to give their personal care and labor to the common concerns. This must be supplied by some one; and if the father does not supply his proportion of labor, it is provided that he shall pay a certain sum as an equivalent; and if after two years, he sees fit to withdraw his care and labor altogether, he is to pay a certain other sum as a commutation. These payments are instead of the labor and care which are due from him as a partner. They are to purchase, or to pay for, them, if he does not render them. They are capital, put in instead of labor. He shares in the increase or profit on the partnership property, created by this labor and care, but he cannot share in the first payment. He might as well charge for the labor, had he rendered it. If he did not actually pay these sums (such as might be payable), he is to be charged with them and interest, but not with the profit of them. Another item which complainant alleges he is entitled to, is his portion of the clip of wool for 1850, but he has waived this.

The only remaining item of personalty, is the one-fourth of the price received for a claim sold Reinking. This he is entitled to.

We are next brought to the question, whether this proceeding is legally correct. What is it? The survivor of two partners brings his bill against the personal representatives and the heirs at law of the deceased partner, in relation to both personalty and realty; but both relate to and concern the partnership. The whole is partnership matter. It is a bill to settle the affairs of the firm. He sues the representatives in relation to the personalty; and he sues both them and the heirs, in relation to the realty, connected with the partnership. It is true that a surviving partner may take the affairs of the firm into his own hands, and settle them. But this supposes them in such a state that he can do so: or rather, it does not cover the case of a deceased partner,

being indebted to the firm. It does not preclude the survivor from looking to the estate of the deceased debtor-partner. But he alleges that all matters relating to the personalty were settled, except certain and specific ones, so that there is, in truth, no general partnership settlement to be made or called for.

This preliminary review of the contract of partnership, has been necessary to the clear understanding of the grounds of demurrer, and in order to save a great amount of repetition in considering those grounds severally. We now take up the demurrer, and examine the causes briefly in their order.

The first and second causes, belonging together, are, that the petition shows an unsettled partnership account, but does not show the amount of capital stock furnished by each partner; nor the amount which each expended in carrying on the partnership; nor that which each received therefrom; nor the interest of the several partners; nor the manner of conducting the business; and so gives no basis upon which the court can decree an account and settlement of the partnership business. The petition does show the original amount of capital stock furnished by each, and so far as that affects it, their respective interests also. If either added more afterwards, he should make it appear. If the complainant claims no more, he gets no more. If the deceased partner furnished more, his representatives are to show it. It is not to be assumed that he did, and the bill is not defective for not stating that he did. To hold it so, would be assuming this, without either averment or proof; and the same reasoning precisely, applies to the matter of the amount expended by each in the affairs of the firm. As to the amount received by each from the firm, it is not a necessary inference that either one took anything out. But further, this point is covered by the fact, that the bill explicitly alleges that the two partners, Jacob and Benjamin, had a full settlement and division of all the personal property of the partnership, which, from the tenor and allegations of the bill, must be understood to include all the claims to personalty, except certain specific ones. It is not perceived what

statement of the mode and manner of conducting the concerns, farther than is made, would be of any importance. The interest of the parties is given definitely, and there is a sufficient basis upon which to proceed. The third cause, being general, will be noticed hereafter.

Fourth: That the verbal contract in relation to the partition of the lands, or the setting off to plaintiff the certain lands which he claims, not having been executed before the death of the said Jacob, those lands, at his death, became part of the assets of his estate, in like manner with any others owned by him at his decease. That the lands were purchased in the name of the father, we are not disposed to regard as a bar to the complainant's claim. It was provided that if the partnership ceased before the expiration of its term, the sons were to receive of this capital stock only *pro rata;* and therefore, to control this, it was requisite that the title should be held by him who furnished it in the first instance, until subsequent events should show how much, or what proportion, the sons were to receive. Thus, if they had continued together the five years, they would have received their full proportion of one-fourth each. But before that time, John has sold his interest and left; Benjamin continues longer, and until the father terminates the relation. It is not till this event, that Benjamin can tell what he is entitled to. This would seem to afford adequate reason for the title remaining in the father, but it does not present any substantial obstacle to the son's obtaining his share. There is a written contract, signed by the parties, containing all the essential matters which could, in the nature of the case, be then specified. What items of property should come into the firm, was in the future. What tracts of land would be bought and used by, or appropriated to, the partnership, was to be determined by their future action. These must be ascertained by the evidence. There is in this, no violation of the rules of law in relation to written instruments, or to contracts concerning land. The contract is complete, and in writing, but the objects to which it applies are to be pointed out. At least, we are disposed to so regard

the question at present, on this demurrer, and leave it to be brought up again, in a more direct form, and on fuller discussion, if the parties see cause. This applies to the claim as a partner, to a share in the land; but it may be that it does not apply, in full force, to the claim to the certain parcel or parcels. But should the complainant sustain his allegations in respect to these, equity would dictate that these should enter into his portion, if a division were decreed.

The fifth cause is covered by the preceding remarks. The sixth cause is, that if petitioner has any just claim, it is one which can be prosecuted in the county court (as a court of probate) only. Sections 1362 and 1363 of the Code, present no objection to this suit. The cause all taken together, could not be conducted in the county court, and it is very doubtful whether any part of it, taken separately, could be.

The seventh and eighth causes, with the sixth, go to a misjoinder of parties, and subject matter. All this is answered by the consideration that this is a bill in equity to settle an unsettled portion of the affairs of a partnership, relating to both personalty and realty, in which both the personal representatives and the heirs at law of the deceased member, are concerned, and which cannot well be separated, or which it is not necessary, at least, to disjoin. And as to the probate court, again, that has no authority in a bill for a specific performance; neither has it in a bill in equity, to settle the affairs of a partnership.

The ninth cause of demurrer alleges that the parties have agreed upon the tribunal or forum by which their business was to be settled, and that the petition gives no reason for applying to this court, and invoking its aid, in settling the partnership. This seems to be completely answered by an averment of the bill, that the complainant has frequently endeavored to have the executors and heirs settle the said claims, and has applied to them to have the said one-fourth portion of petitioner set off to him, under and by virtue of said agreement, and that they have hitherto failed, neglected, and refused so to do. The agreement provides that, "should any of the company die, his surviving friends, or a justice

of the peace, shall appoint one or more judicious disinterested person or persons, to act in his stead in making the distribution of property, in conformity with the terms before stated." The third cause, that the petition discloses no matter upon which the court can act, or over which it has original jurisdiction, is involved in the fifth, sixth, seventh, and eighth causes, and is answered by the remarks made upon those. The case being looked at closely, and the cause of action being analyzed, the apparent grounds of demurrer disappear.

The demurrer should have been overruled, and the cause is remanded for the respondents to answer.

COOPER *v.* WOODROW & COFFEEN.

When a mistake in the transcript from the docket of a justice of the peace is unquestionably established, it may be corrected, so as to fully try the cause in the District Court, upon the same issues which were tried before the justice.

A return of a justice, amending his transcript, is a part of the record, and may be read to the jury, to show the matters in issue.

Appeal from the Polk District Court.

THIS cause was originally tried before a justice of the peace. From the judgment there rendered, defendants appealed. The transcript shows that before the justice, the defendants plead an offset, and also tender. After the appeal, and while the cause was pending in the District Court, the justice made an amended return, showing that the plaintiff, when the case was before him, verbally denied the offset of said defendant, except as to certain items. Defendants moved to strike from the files this amended return, which motion was overruled, and they excepted. On the trial, it appears that plaintiff read to the jury the amended return, to which defendants objected, which objection was overruled,

and they again excepted. Judgment for plaintiff, and defendants appeal.

Jewett & Hull, for the appellants.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—Appellants assign for error, the rulings of the court on their motion to strike from the files, and rule from the jury, said amended transcript or return of the justice. The objections were not well taken. The pleadings before a justice of the peace, may be written or oral. If oral, they must in substance, be written down by the justice in his docket. Code, § 2284. It was not only the right, but the duty, of the justice, to amend his return, and if there had ever been a mistake by him in his docket entries, the court might have corrected the mistake, or directed him to do so. Sections 2338–9. When such mistake is unquestionably established, the law contemplates that it may be corrected, so as to fully try the case upon the same issues which were tried before the justice; and after the return was thus made, we can see no conceivable objection to permitting it to be read as a paper in the cause, to the jury. It was a part of the record, and like any other paper, might be read as showing the matters in issue. True, it was properly the province of the court to determine the state of the issues, but counsel might nevertheless refer to the papers in argument. If it was offered as evidence, as is claimed, it can make no substantial difference. It was in evidence any how (as far as a pleading or transcript can be said to be in evidence), and to read it to the jury could not give it any additional weight.

Judgment affirmed.

STEWART *v.* EWBANK.

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Where the court below, in granting or refusing a new trial, mistakes a legal proposition, it is as much the subject of revision as any other decision.

In such cases, the granting or refusing the motion, is not a question of discretion, but one strictly legal in its character, and to be determined upon the law applicable to the case.

And where, after two verdicts in favor of the plaintiff, the second verdict was set aside, and a new trial granted, on the ground, supported by affidavits, that one of the jurors, at a previous term of the court, in the presence of the affiants, expressed his opinion of the merits of the cause, and said that he believed the defendant was a rascal, and ought to be made to pay every cent of the money sued for in said cause, and that if he was a juror therein, he should so find; and where there was nothing in the record to show that any of the jurors, at the time of being impanneled, was examined under oath or otherwise, or that the defendant was ignorant of the prejudice of the juror at the time he was sworn; *Held*, That the showing was insufficient to warrant the granting of a new trial.

Appeal from the Pottawatamie District Court.

THIS action was brought to recover the amount of certain notes, and also an account. At the April term, 1855, of the District Court in Pottawatamie county, there was a trial by jury, and verdict for plaintiff. A motion was then made for a new trial, because the verdict was contrary to evidence, and the law as given by the court, as well as for other reasons. This motion was overruled. A further motion for a new trial was then made, based upon an allegation of newly discovered evidence, which was sustained. At the next October term, a second trial was had, and verdict for plaintiff, for about the same amount as the previous verdict, adding perhaps the accruing interest. A motion was again made for a new trial: First, because it was contrary to the evidence. Second, for the reason that it was against the instructions of the court. Third, because it was not the verdict of the entire jury, but was found by an agreement that a majority should rule. And fourth, for the reason that one of the jurors, before the trial, gave an unqualified opinion

that defendant ought to pay the full amount in controversy. This motion was overruled as to all the causes, except the fourth; and on that ground a new trial was granted. To sustain the allegation in said fourth ground set forth, defendant showed by the affidavits of three disinterested persons, that one of the jurors (Allen) at the previous April term of the court, had, in their presence, "expressed his opinion of the merits of the cause," and had said "that he believed defendant was a rascal, and ought to be made to pay every cent of the money sued for in said cause, and that if he was a juror therein, he should so find." Upon this showing alone, the court granted a new trial, and from this order plaintiff now appeals.

Street & Stone, for the appellant.

Clarke & Henley, for the appellee.

The appellee first maintains that the decision of the court below, sustaining a motion for a new trial, is not subject to revision in this court. Ordinarily, it is true, this court will hesitate in disturbing these decisions, where the question is one depending upon discretion. Even in such cases, however, this court has frequently entertained appeals, and affirmed or reversed, as that discretion was properly or improperly exercised. See *Lloyd* v. *McClure*, 2 G. Greene, 139; *Millard* v. *Suiger*, Ib. 144, where the decision of the court below refusing a new trial, was affirmed; also *Jones* v. *Fennimore*, 1 G. Greene, 134; *Shaw* v. *Sweeney*, 2 Ib. 587, where this court reversed the judgments below, because new trials had been refused. And further, *Reeves* v. *Royal*, 2 Ib. 451, where an order granting a new trial was affirmed; and *Jordan* v. *Reed*, 1 Iowa, 135, which was reversed, because a second new trial was not granted to the same party. Where the court below, in granting or refusing a new trial, mistakes a legal proposition, it is as much the subject of revision as any other decision. In such cases, it is not a question of discretion, but one strictly legal in its

character, and to be determined upon the law applicable to the case. *Shaw* v. *Sweeney*, 2 G. Greene, 587; *Jones* v. *Cooprider*, 1 Blackf. 47.

In this case the new trial was granted, not because the verdict was against the evidence, or of misdirection as to the law, or on account of newly discovered evidence, but because, from the showing made as to one of the jurors, there had not been a fair and impartial trial; and the question for us to determine is, whether that showing is sufficient. And we have no hesitation in holding it insufficient, and remanding the case, with directions to enter judgment on the second verdict. Two verdicts have been rendered in this case in favor of plaintiff, and in both instances they have been sustained, as in accordance with the law and testimony. We say they have been sustained, so far as these grounds are concerned, for in both motions these objections were distinctly overruled. A new trial was first granted on account of newly discovered evidence. A second trial was had, with the same result. Under such circumstances, it was but fair to conclude that the verdict was right, and improper conduct on the part of jurors should have been clearly shown, to justify a new trial. For this reason alone, the court below might reasonably have refused the motion. Having granted it, however, we should not on this ground alone, disturb such order. We refer to it, for the purpose of showing the probable correctness of the verdict, notwithstanding the prejudice of the juror named, though ever so strong. But independently of this, there was no cause for granting a third trial. There is nothing to show that this juror, or any of them, was examined, either under oath or otherwise, at the time of their being impanneled. For aught that appears, the prejudice of this juror was as well known to defendant, before as after he was sworn. The juror was competent, unless objection was made. The defendant might have his case tried by twelve of his most bitter enemies, and if he should do so, without objection, he could not claim a new trial, because jurors were prejudiced; and particularly so, unless he negatives previous knowledge of such preju-

dice. If he would save the objection, he must examine the jurors touching their qualifications, before they are sworn, and some of the cases go so far as to require that he shall examine them under oath. On this subject, see *Jeffries* v. *Randall*, 14 Mass. 205; *Poore* v. *Commonwealth*, 2 Virg. Cas. 474; *Brown* v. *Same*, Ib. 516; *Simpson* v. *Pitman*, 13 Ohio, 365; *Vennum* v. *Harwood*, 1 Gilm. 659; *Glover* v. *Woolsey*, 9 Geo. 85; *Lisle* v. *The State*, 6 Miss. 426; *Seal* v. *The State*, 13 S. & M. 286; *Childress* v. *Ford*, 10 Ib. 25; *Troxdate* v. *The State*, 9 Humph. 411; *Pelton* v. *Jones, Bacon & Co.*, Morris, 491; *Sellers* v. *The People*, 3 Scam. 412; 2 Wat. & Graham on New Trials, 474, and cases there cited.

Judgment reversed.

VEACH *v.* SCHAUP *et al.*

In a proceeding to foreclose a mortgage, all persons having an interest in the equity of redemption, should be made parties to the bill, and if any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them.

On the 16th of March, 1852, C. G., who afterwards intermarried with K., conveyed to S. ten acres, including a mill site, out of a certain quarter section of land. At the time of the conveyance to S., M. held a mortgage on the whole quarter section, executed by C. G., to secure the payment of $218.85, dated May 28, 1851, which was filed for record, July 5, 1851. M. at the time of the purchase by S., agreed to release the ten acres held by S. from all lien of the mortgage, and on the 22d of May, 1854, did execute to S. a release, which was dated back so as to conform to the date of the agreement to release. At the April term, 1853, of the District Court of Jackson county, M. obtained a decree of foreclosure under the mortgage executed by C. G. against her and her husband, upon the whole quarter section. S. took possession under the deed from C. G., and made valuable improvements on the ten acres. He was not made a party to, and did not know of the proceedings to foreclose. The judgment of foreclosure was assigned by M. to B., who issued execution thereon, under which the sheriff sold the whole quarter section to B. The sale was made June 30, 1853, and a deed for the premises made by the sheriff to B. July 1, 1854. B. was present, knew of the purchase, and drew up the deed from C. G. to S. On the 26th of September, 1853, S. mortgaged the ten acre tract to V. to secure the pay-

ment of $1,200. B. drew up and acknowledged the mortgage from S. to V. as justice of the peace—said nothing at the time of any claim he had on the premises—and did not forbid the conveyance. B., about the time S. obtained the release from M., gave S. a writing of the nature of a quit-claim deed, to the ten acre tract, but it was not acknowledged or recorded, and is lost. B. kept the fact that he had bought the land secret, and had stated that he did not wish V. to know it until the time of redemption had passed, and that he would not have intrusted the secret to his father or mother. On a bill filed by V. to foreclose the mortgage executed by S., to which S. and B. were made parties;

Held, 1. That S. not having been made a party to the proceedings to foreclose the mortgage executed by C. G. to M., was not bound by the decree, and had the right to redeem the ten acre tract in the hands of B. from the lien of the mortgage to M.

2. That V., as to all the rights of S. in the premises, was his representative, and might redeem in the same manner.

3. That whatever equity S. would be permitted to set up against B., was equally good in the hands of V.

4. That V. was entitled to a decree of foreclosure against all the interest of S. in the mortgaged premises.

5. That the purchase by B. under the M. mortgage, did not extinguish all the right of S. in the premises.

Appeal from the Jackson District Court.

THIS is a petition for the foreclosure of a mortgage upon ten acres of ground, including a mill site, given by Schaup to Veach, on the 26th September, 1853, to secure the payment of $1,200. The premises were conveyed to Schaup on the 16th March, 1852, by Catharine Gilmer, who afterwards intermarried with Patrick Killaan. At the time of the conveyance to Schaup, Geo. Milner held a mortgage on the quarter section, of which the ten acre tract was a part, from Catharine Gilmer, to secure the payment of $218.85; this mortgage was dated May 28th, 1851, and was filed for record July 5th, 1851. Milner, at the time of the purchase by Schaup, agreed to release the ten acres held by Schaup from all lien of the mortgage, and on the 22d May, 1854, did execute to Schaup a release, which was dated back so as to conform to the date of the agreement to release, May 16th, 1852. At the April term, 1853, of the District Court of Jackson county, Milner obtained a decree of foreclosure

against the said Catharine and her husband, upon the mortgage on said quarter section. Schaup, who held a conveyance of the ten acres, was not made a party, and did not know of the proceedings in foreclosure. The judgment was afterwards assigned by Milner to Birge, one of defendants, who issued execution thereon, under which the sheriff sold and conveyed the whole quarter section, and Birge became the purchaser. The sale was June 30th, 1853, and the deed was not made until July 1st, 1854.

This petition for foreclosure was filed by Veach, March 12th, 1855, making Schaup and Birge parties. It charges that Birge sets up a claim to the ten acres, having bought the same at the sheriff's sale on the decree of foreclosure of Milner against Killaan and wife; that the ten acres were bought by Schaup of Catharine Gilmer, and paid for, knowing that Milner held a mortgage on the quarter section, of which it is part; that Milner, at the time of the purchase, agreed to release the mortgage lien as to the ten acres, and did so release it, May 22d, 1854; that Schaup had possession of the ten acres ever since his purchase, and had made extensive improvements thereon, and among others, had erected an extensive flouring-mill, the whole property and improvements being worth several thousand dollars. It further charges that Birge was present, and knew of the purchase, and drew up the deed from Catharine Gilmer to Schaup; and that he was present and drew up the mortgage from Schaup to complainant, and took the acknowledgment of the same as justice of the peace; that Birge said nothing at the time of any claim he had to the land, and did not forbid the conveyance from Schaup to Veach. The petition prays judgment for the amount due complainant on the mortgage against Schaup, and for the further sum of $250, paid by him, to purchase in an outstanding title to the premises, in the hands of D. F. Spurr; that the title of Birge to the ten acres may be declared null and void, as to complainant; and that a mistake in the deed to Schaup from Catharine Gilmer may be corrected, which it is admitted was known to Birge and Schaup at the time it was made.

The answer of Schaup admits the material allegations of the bill set forth above. It states that Birge, at the time of making the mortgage to Veach, did not make any representation as to title of Schaup in the ten acres; and denies all fraud and combination with Birge against complainant. The answer of Birge admits the title of Catharine Gilmer in the land, at the time of the sale to Schaup; but sets up the prior mortgage to Milner, which was foreclosed by judgment, April, 1853; that defendant purchased the judgment of Milner, and issued execution under which the sheriff sold the quarter section, of which the ten acres is part, June 30th, 1853, and made a deed to defendant July 1st, 1854; admits the sale by Catharine Gilmer to Schaup, and that Schaup took possession, which he has held ever since; admits the making of the release by Milner to Schaup, for the ten acres, made May 22d, 1854, as charged in the petition; but denies that Milner could at the time release the ten acres from the sale under the judgment; admits the mortgage from Schaup to complainant, and that he drew up and took the acknowledgement of the same; and that he made no mention at the time, of his having any claim to the land mortgaged. The answer further asserts the superior title of defendant to the land, and denies all fraud or combination with Schaup, to defraud complainant.

The defendant Schaup was examined as a witness, and swears in his deposition, that on the day the conveyance was made to him by Catharine Gilmer, George Milner promised him to give him a release of his mortgage as to the ten acres, which he afterwards gave him on the day it purports to have been acknowledged; that when the mortgage was made to Veach, Birge made no claim to the ten acres, and in preparing the deed took the description from the deed from Catharine Gilmer to Schaup; that Birge said nothing to Schaup of having any claim upon the ten acres, until July, 1853, when he was going to borrow money to pay the mortgage to Veach; Birge then showed him the sheriff's deed, which he had obtained, and told him he could not borrow money on the mill property; that the land belonged

to him; that he and Birge went to Galena, and together borrowed $2,500; and executed a mortgage, July 10th, 1854, to Kavman, on the mill property, to secure the payment of the same. Schaup further testifies, that Birge at one time, gave him some kind of writing, in the shape of a quit-claim deed to the ten acres and mill property. This was about the time he obtained the release from Milner. He went to Birge two or three times to get it, who partly refused to give it; said it was not necessary, and would do no good. He finally signed it, but it was not acknowledged or recorded, and is now lost. It appeared further in evidence, that Birge had kept the fact secret, of his having bought the land, and that he said he did not wish Veach to know it until the time of redemption had passed; and that he told one witness, he would not have intrusted the secret to his father or mother.

The court below dismissed the bill as to Birge, and rendered a decree for petitioner for $1,741.64, without any judgment of foreclosure against the land. Complainant appeals.

Smith, McKinlay & Poor, for the appellant.

W. E. Leffingwell, for the appellee.

STOCKTON, J.—The first question raised in the argument by complainant, is, as to the validity of the proceeding in foreclosure by Milner against Catharine Gilmer. It is claimed that Schaup, as the subsequent grantee of the ten acres, and assignee of the equity of redemption, should have been made a party to the suit, and that not having been made a party, he is not bound by the decree. Whether or not it was necessary to make a subsequent incumbrancer a party to the proceedings in foreclosure, has not been determined by the Code, nor so far as we are informed, has the question been adjudicated by this court. Under the act of 1848, section 4, in force when this mortgage was given, the mortgagee in proceedings to foreclose, must make the mortgagor, and all persons actually occupying the mortgage estate, parties. It is claimed

by the complainant, that by virtue of this provision, and the doctrine that the law in force at the time of the execution of the mortgage, enters into and becomes a part of the contract, Schaup should have been made a party to the foreclosure suit. While we cannot recognize the principle to the full extent claimed by the complainant, we have no hesitation in holding, according to the well settled rules of chancery proceedings, that all persons having an interest in the equity of redemption, should be made parties to a bill of foreclosure; and if any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them. Story's Eq. Pleadings, § 193; Adams' Eq. 315, note.

In New York, it has been held that, where the vendee of the mortgagor was not made a party, and there had been a foreclosure and sale, the proceedings were void as to such vendee, and he might maintain ejectment against a purchaser under the chancery proceedings. The decision was based on the ground, that the mortgagor having parted with his interest before the bill filed, and his vendee not having been made a party, the purchaser at the sale under the foreclosure, acquired no interest in the premises, except as against the mortgagor. *Watson* v. *Spence*, 20 Wend. 260.

In Ohio, it has been held, that the proceedings are not void, but that the vendee of the mortgagor, not made a party to the proceedings in foreclosure, may have a bill to redeem. *Frische* v. *Kramer*, 16 Ohio, 125. To the same effect is the doctrine in Illinois, in the case of *Bradley* v. *Snyder*, 16 Ill. 263; see also *Haines* v. *Beach*, 8 John. Ch. 459; *Ensworth* v. *Lambert*, 4 Ib. 605; 2 Hilliard on Mort. 79, 88.

Applying the doctrine established by the above authorities, to the present case, we find that at the time the proceedings in foreclosure commenced, Catharine Gilmer had conveyed all her interest in the mill premises to Schaup; and the latter, not having been made a party to the suit, is not bound by it, and has, to say the least, the right to redeem the ten acres in the hands of Birge, from the lien of the mortgage to Milner. Veach, as to all the rights of Schaup

in the premises, is his representative, and may redeem in the same manner that Schaup might. Whatever equity Schaup would be permitted to set up against Birge, is equally good in the hands of Veach. Schaup, however, is not seeking any relief against the title obtained by Birge, and to all appearance seems to be resisting the claims set up by Veach, to have the mill property subject to the payment of his mortgage. What then are the rights of complainant under such circumstances? There is no question made by defendants, as to the right of Veach to have his money from Schaup; and we are of opinion, that he is entitled to a decree of foreclosure against all the interest of Schaup in the mortgaged premises, but what that interest is, may involve another inquiry. But we are of opinion, that the District Court erred in dismissing his petition, with only a personal judgment against Schaup, thereby declaring that he had no interest in the land upon which the mortgage conveyed any lien, and that the same was taken away by the paramount lien of Birge, under the first mortgage and the sheriff's sale under it. Now, we are not of opinion, that the purchase by Birge, under the Milner mortgage, extinguished all the right of Schaup in the premises. Had he been made a party to the suit of foreclosure, and had he made no objection to the decree, or taken no steps to redeem the mill property from the lien of the mortgage, his interest might have been extinguished by the decree and sheriff's sale to Birge. But Schaup had purchased the ten acres of Catharine Gilmer in good faith, and for a valuable consideration; and although he had notice of the pre-existing mortgage to Milner, yet he took possession, and made his improvements under the supposition—indeed with the express agreement of Milner—that the lien of the mortgage as to the ten acres, was released. These facts would be sufficient to give Schaup, at least, a claim for his improvements. He had purchased the ten acres of Catharine Gilmer, for one hundred and fifty dollars, and made extensive and valuable improvements, until the property has become worth five or six thousand dollars. Certainly these improvements do not pass to Birge, under

his sheriff's deed. All that Birge is entitled to claim under it, is the value of the land, in its unimproved condition, and as it was when conveyed to Schaup. That was all that Milner acquired any right to, under the mortgage from Catharine Gilmer, to secure the payment of the two hundred and eighteen dollars, and that was all upon which the mortgage can be claimed to operate as a lien. Milner had, when Schaup purchased of Catharine Gilmer, agreed to release his mortgage lien as to the ten acres. He then knew of the purchase by Schaup, of his possession and improvements. Birge, who is his assignee, knew at the time he purchased the mortgage and decree of foreclosure from Milner, that Schaup had already purchased and paid Catharine Gilmer for the ten acres. Schaup's possession was notice to all the world of the interest he had in the land, whatever it was. In addition to this, Birge, after he had purchased the whole tract at the sheriff's sale, and while he had the sheriff's certificate of purchase in his pocket, when Veach and Schaup came to him to get him to draw up the mortgage for $1,200, and to take the acknowledgment of it, as justice of the peace, is silent as to any claim he has to the property intended to be mortgaged, and suffers Veach to lend his money on a title and security which he knew to be unsafe. Now, if it was not the duty of Birge, when called on to write the deed, to make known to the parties the exact state of the title to the ten acres, and the interest which he held in it himself, it would, at least, be exceedingly inequitable to allow him to derive a positive benefit from his silence, and to take the land with all the improvements on it, which had been paid for and put there with Veach's money, obtained by Schaup on the mortgage drawn up by himself. It will be proper, therefore, for the District Court to render a decree in favor of complainant, allowing him to redeem the ten acres, comprising the mill property, conveyed to Schaup by Catharine Gilmer, from the operation and effect of the sale made by the sheriff to Birge, under the decree of foreclosure, on his paying into court, for the use of Birge, a sum of money which shall have the same proportion to the whole amount

due on the decree assigned to Birge, as the ten acres, without the improvements placed thereon by Schaup, since his purchase, bears to the one hundred and thirty-one acres, included in the mortgage. This is making the ten acres sold to Schaup, bear its fair proportion of the whole amount of the mortgage debt. On the payment of the money into court by Veach, the court will by its order and decree, direct that the title of Birge in the said ten acres be released and extinguished, and render a judgment of foreclosure in favor of Veach against Schaup, as to the mortgaged premises, and for such amount as may be found due on the mortgage, including such sum as he may be required to pay into court for Birge; and the court will further direct a sale of the mortgaged premises to satisfy the amount decreed in favor of Veach, with costs.

No opposition has been made to the relief sought in the petition, as to the mistake in the deed from Catharine Gilmer to Schaup, and as the same is confessed, the court will decree the correction of the same. It is also claimed, that complainant is entitled to recover against Schaup, the amount alleged to have been paid by complainant to D. F. Spurr, for the conveyance by Spurr of his title to the mill property, derived from Catharine Gilmer and her husband. We do not see the justice on which this claim is founded. The deed from Catharine and Patrick Killaan was dated September 6th, 1854. At this date, to say nothing of the previous deed the parties had made to Birge of the same premises, all the title and interest of Catharine and Patrick Killaan, therein, had passed to Birge, under the sheriff's deed of July 1st, 1854, which had been duly recorded. And although we have felt it our duty to hold, that Schaup was not bound by the proceeding in the suit wherein the decree of foreclosure was rendered, because he was not made a party; yet the proceedings were valid as to Catharine Killaan, and the sheriff's deed passed all her interest in the mill property to Birge. This deed was recorded long before the deed to Spurr was obtained. Of all this, Spurr was bound to take

notice; and consequently he took no title by the conveyance to him from Catharine and Patrick Killaan.

The decree of the District Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

HAYS & BLANCHARD *v.* GORBY.

The bond executed by the plaintiff in a proceeding by attachment, need not be referred to in the writ.

When a case comes from a justice of the peace into the District Court, by writ of error, the sole question to be determined is, whether the justice erred in the particular decision made and complained of in the affidavit for the writ.

The District Court cannot in such a proceeding, hear and decide on questions which were not before the justice, and which are not referred to in the affidavit for the writ.

Appeal from the Van Buren District Court.

THIS action was commenced before a justice of the peace. An attachment was issued, and on the return day, the parties appeared, and defendant moved to dissolve the attachment, for the reason that the writ did not recite that a *bond* had been filed, as required by the Code. This motion was overruled, and defendant brought the cause into the District Court, by writ of error. The affidavit which was filed as the foundation of the writ in the District Court, recites alone for error the decision on said motion. The judgment of the justice was reversed, and the writ of attachment quashed. Plaintiffs appeal.

C. C. Nourse, for the appellants.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—We think the court below erred in quashing this attachment. Our statute nowhere requires that the

bond shall be referred to in the writ, nor can we see any good reason, upon principle, why it need state that such bond has been given. The bond is for the protection of the defendant, it is true, but his rights are quite as well secured by the filing of a bond *in fact*, without its mention in the writ, as they are by the recital therein of that fact. The object and office of the writ, is to authorize the officers to seize property and hold it, subject to any judgment that may be obtained in the main action. The sheriff does not take the bond, nor need he inquire whether one has in fact been given. If the giving of the bond is necessary for his protection, then the averment in the writ that plaintiffs have executed it, (when in truth they have not), would not excuse. It is the giving of the *bond*, *in fact*, and not a statement that it has been done, that is the substance—that which is necessary to entitle a party to his attachment. Who is protected, let us ask, by requiring what appellee insists upon, in this case? Not the sheriff, not the clerk, nor yet the defendant. The defendant (and he is indeed the only person whose rights we need consider at this time) finds his security, if any, in the bond actually filed. If the clerk has not taken such a bond, he is liable. If he has, the defendant is as perfectly secured in every substantial legal right, which he may have under the attachment process, as if the writ had advised him that the bond was executed. But, again, if this recital is necessary, why not also recite the amount of the bond, and the sureties thereon. Why not require it to specify the particular character of the debt upon which plaintiff sues? It strikes us that the argument of appellee, if carried out, would render such recitals quite as necessary as the one he contends for.

It is claimed by appellee, however, that this court, in the case of *Barber* v. *Swan*, June term, 1854, held such a recital necessary. And we may add, that we conclude from the argument at bar, that the court below decided this question upon the strength of that case. An examination of that opinion, however, does not warrant any such conclusion. There, as stated in the opinion by GREENE, J., the writ did

not show that any action was pending—did not give the names of the parties to the suit—did not state the grounds which authorized the court to issue it—did not confer authority upon the officer to attach property—nor finally, did it show that the indispensable conditions of the Code had been complied with. It is also said, that "the paper called a writ of attachment could not easily be recognized as such. It contains but few of the essential requisites of such a writ." Under such circumstances, the writ was very properly held defective. But the argument is not legitimate, which would hold the writ in this case bad, because that was. In that writ, there was a want of parties—a want of reference to the grounds for the attachment—a want of authority to the officer to attach property; indeed, the absence of most of the essential requisites of such a process. Here, everything is in proper form, save that the bond is not referred to in the writ itself. This question, in this case then, stands unaffected by anything decided in that, and we conclude that the writ was improperly quashed.

The appellee further urges, that the decision in the District Court was right, and should not be disturbed, for the reason that the transcript shows that the judgment before the justice in the case, to which the attachment is auxiliary, was in his favor, and that this necessarily dissolved the attachment, and released the property. The judgment of the justice was for defendant, and from this the plaintiff appealed. Whether that appeal was pending, or what disposition had been made of it, when the decision in this part of the case was heard, is not shown. Whether that appeal would have the effect of preventing a dissolution of the attachment, or whether such judgment of the justice *ipso facto*, dissolved it, we do not stop to inquire, because we do not think that this point can be urged by appellee at this time. The motion before the justice was to dissolve the attachment for certain specified causes, therein particularly stated. The affidavit for the writ of error is based alone upon the fact, that "the justice had held that it was not necessary for the writ to state that a bond had been filed," and to this alone was the justice

bound or required by law, to make his return. This alleged defect, then, was the only question properly before the District Court. The Code requires that the affidavit shall set forth the *errors complained of*, and that the justice shall certify the proceedings before him, so far as they relate to the *facts stated in the affidavit*. When the case comes into the District Court, the sole question to be determined is, whether the justice erred in the particular decision made and complained of in the affidavit. The District Court cannot in such a proceeding, hear and decide questions which were not before the justice, of which the plaintiff in error did not complain, and to which he did not refer in his affidavit. Did the justice decide correctly or incorrectly on the motion made before him, as to the particular facts stated in the affidavit? was the question, and the only question, before the District Court. We conclude then, that this objection comes too late, even granting it to have been urged in the District Court, which does not appear. But particularly is it so, when urged for the first time in this court. *Breiney v. Jones*, 1 G. Greene, 366; *Hintermister v. The State*, 1 Iowa, 101.

What effect the judgment before the justice may have; whether the attached property was thereby relieved, whether the sureties upon the delivery bond, if one was given, were thereby discharged, we do not determine. These and similar questions, may arise hereafter; but at present, we only decide that there was error in dissolving the attachment, for the cause stated in the affidavit.

Judgment reversed.

CONRAD & CO. *v.* BALDWIN.

Where the clerk of a district court certified that certain papers which *preceded* his certificate, was a true, *perfect*, and *complete* transcript of the proceedings in the cause, among which papers, was one purporting to be a bill of exceptions, which was in no manner certified to be a part of the record, contained nothing more than the title of the cause, and the signature of the judge, to connect it with the cause, and did not appear to have been filed in court; *Held*, That the Supreme Court could not treat the paper as a part of the record.

Where a record presents conflicting dates as to any fact in a cause, being governed by one of which, the appellate court would find error, while by the other there would be no error, that court will be guided by that which will sustain the judgment below.

Where it appeared from the record as certified, that on the 8th of April, 1856, the defendant filed his answer, and leave was given to file a replication, and where pleas of *nul tiel record* and former recovery, were found in the transcript, but the date of their filing was not shown; and where on the 15th of the same month, there was judgment for the plaintiff on the *first* plea, and leave given to file the second; and where on the 16th, the plaintiff had judgment on the *second* plea, and then, the record states, *an answer was filed*; and where after the judgment on the *first* plea, the plaintiff moved for final judgment, which was overruled; the second plea filed, and the issue on that being decided for the plaintiff, the defendant filed an affidavit for a continuance, which was held to be sufficient, and the cause continued: *Held*, That as the record left it doubtful when the answer was filed, this court would presume it to have been filed on the earliest day named in the record.

Appeal from the Pottawatamie District Court.

THIS suit was brought to recover the balance due on a judgment rendered in the District Court of Wapello county, in this state. The defendant pleaded *nul tiel record*, former recovery, and payment. The questions presented for determination, arise upon these defences. The material facts will be found in the opinion of the court.

Clark & Henley, for the appellant.

No appearance for the appellee.

WRIGHT, C. J.—It first becomes material to inquire, whe-

ther a paper appearing in the record, can be treated as a bill of exceptions. The clerk certifies that certain papers, which *precede* his certificate are a true, *perfect*, and *complete* transcript of the proceedings in this cause. After this, we find a paper, purporting to be a bill of exceptions, which is in no manner certified to be a part of the record—does not appear to have been filed in court—and nothing beyond the title of the cause, and the signature of the judge, to connect it with the proceedings in the case. Under such circumstances, we cannot treat it as a part of the record. The case must be decided without reference to it. The record, as certified to us, shows that on the 8th of April, 1856, defendant filed his *answer*, and leave was given to file replication. Pleas of *nul tiel record*, and of former recovery, are also found with the papers, but there is nothing to show when they were filed. On the 15th of the same month, there was judgment for plaintiff on the first plea, and leave was given to file the second. On the next day, the plaintiff had judgment on the second plea, and then the record proceeds to state, *an answer was filed*. After the judgment on the first plea, plaintiff moved for final judgment, which was overruled, and the second plea permitted to be filed, and the issue on that being decided for plaintiffs, defendant filed his affidavit for a continuance, which was held to be sufficient, and the cause continued. Plaintiffs assign for error, the action of the court below, in not rendering final judgment in their favor, in permitting defendant to file his several defences, at the times and the manner above shown, and in granting the continuance. The argument is, that it was the duty of defendant to file all his pleas or defences at the same time, and that he could not, after the issue had been determined against him, or his plea of *nul tiel record*, file other defences, but that on the determination of such plea, plaintiffs were entitled to final judgment. However correct this position may be in a proper case, we think it has no weight under the circumstances here disclosed. The record leaves it doubtful when the defendant's *answer* was filed. At one time stating it to be on the 8th—at another, on the 16th of April. Under

such circumstances, we will presume it to have been filed on the day first named, for on this hypothesis, the action of the court below is clearly correct; and every presumption should be given in favor of such action. When a record presents conflicting dates as to any fact in a case, being governed by one of which, we would find error, while by the other, there would be no error, we should be guided by the one which will sustain the judgment below. Acting upon this rule, then, it appears that defendant *first* filed his answer, which avers payment, and afterwards filed the pleas named. These pleas were first properly disposed of, and thereupon plaintiffs asked for final judgment. This was refused; and on the application of the defendant, the case was continued. To have given judgment for plaintiffs over defendant's answer, and especially, when that was not replied to, would have been clearly erroneous. Had the answer been filed after the decision on the plea, as has been supposed in argument, the question would have been different.

The filing of the second plea, if irregular, can now make no difference. It was disposed of in favor of plaintiffs, but the answer, then on file, still precluded final judgment, as it did when the first plea was decided adverse to defendant. No objection has been pointed out to the affidavit for continuance, and we are unable to see any.

Judgment affirmed.

MITCHELL *v.* THE WISCOTTA LAND COMPANY.

A defendant waives his demurrer to the petition, by pleading over, and going to trial.

The fact that a party accepted a house erected upon his own land, will not preclude him in an action to recover the contract price of the work, from showing that it was done in an unworkmanlike manner, and from setting off his damages arising from the defect, against the plaintiff's claim for the price of the work.

And where in an action to recover for building a house, the court instructed

the jury, "that if defendants, or any of them, were at or about the house during the construction thereof, and giving instructions in relation thereto, and they made no objection during that time to the manner of construction, they cannot after the house is completed, and after they have received it, make any objection:" *Held*, That the instruction was erroneous.

Appeal from the Polk District Court.

THIS is a suit to recover an amount claimed to be due to plaintiff on a written contract, for the erection of a building for defendants. The contract in writing, is set forth in the petition. The answer denies any indebtedness, and denies that plaintiff has performed his part of the contract. And claims to set off against any amount that may be due plaintiff, damages alleged to have been sustained by defendant, by reason of the failure of plaintiff to perform his part of the contract, and by reason of the unworkmanlike manner in which the work is done. To this answer, there was a replication by plaintiff, to which defendant rejoined, and issue was thereon joined. Defendants, during the trial, excepted to certain instructions given to the jury, at request of plaintiff. There was a verdict for the plaintiff, for $239.96; motion for new trial overruled, and judgment on the verdict; from which defendants appeal.

T. Elwood, for the appellant.

J. C. Knapp, for the appellee.

STOCKTON, J.—The defendants' first assignment of errors is, that the court overruled the defendants' demurrer to plaintiff's petition. To this, it is answered that defendants waived their demurrer, by pleading over and going to trial. It is next assigned by the defendants, that the court erred in charging the jury, on motion of the plaintiff, "That if defendants, or any of them, were at or about the house, during the construction thereof, and giving instructions in relation thereto, and they made no objection during that time, to the manner of construction, they cannot after the house is completed, and after they have received it, make any objection."

There was also another instruction, amounting to the same in effect as the foregoing, which was also given by the court, and exception thereto taken by defendants.

We think that these instructions are erroneous. The fact that the defendants were present, during the progress of the erection of the house, giving directions concerning the same, without making objections to the manner in which the work was done; and the further fact, that they received the house when finished, without objection, are certainly proper to be given in evidence to the jury for what they are worth, to rebut the defendants' claim for damages, for the defective execution of the work. The house erected by plaintiff, being upon the defendants' land, they could not do otherwise than accept it; and the fact of the acceptance, without objection, will not preclude them, in a suit to recover the contract price of the work, from showing that it was done in an unworkmanlike manner. The defects of the work may not have developed themselves at the time of the acceptance. The house may to all outward appearance, be well built, when in reality the work is radically defective. In such case, it would be exceedingly unjust, to hold that the defendants are precluded by such acceptance, from showing that the work was improperly or defectively executed, and from setting off his damages arising from the defect, against the plaintiff's claim for the price of the work. For these reasons, we think the instructions above referred to, were erroneous, and the judgment of the District Court should be reversed, and a new trial awarded.

Judgment reversed.

JONES *v.* TIDRICK.

Where in an action for work and labor done, and materials furnished, in the erection of a frame house, and for extra work on another house, there was an answer denying the indebtedness, and claiming damages, by way of set-off, for the failure of plaintiff to perform the work within the time fixed by the contract, for the erection of the house, and for damages for the unskillful manner in which the extra work on the other house was done; and where the defendant offered in evidence two receipts of plaintiff for money paid by defendant on the contract for the frame house: *Held*, That the receipts were properly admitted in evidence.

Appeal from the Polk District Court.

THIS was an action for work and labor done, and materials furnished, in the erection of a house for defendant, and for extra work on a certain other frame house of defendant. There was an answer, denying the indebtedness, and a plea of set-off for damages, by reason of the failure of plaintiff to fulfill his contract in due time in the erection of the house, and also for damages incurred by defendant, by reason of the unskillful manner in which plaintiff did the work on the frame house, for which there is a charge for extra work in the bill of particulars. The evidence for the plaintiff shows, the work and materials were furnished by plaintiff, upon a brick house for defendant, except the charge for extra work on the frame building, the charge for which, amounted to $46.00. After plaintiff had closed his case, defendant offered in evidence two receipts of plaintiff, for money paid him by defendant, on the contract for building the frame house, amounting to $107.00; to the introduction of which, plaintiff objected; but the court overruled the objection, and suffered the receipts to go to the jury, to which plaintiff excepted. There was a verdict and judgment for defendant, and plaintiff appeals. The only error assigned, is the admission of the receipts in evidence.

C. Bates, for the appellant.

Knapp & Caldwell, for the appellee.

STOCKTON, J.—The receipts offered in evidence by defendant, if intended for no other purpose, may have been proper to lay the foundation for the defendant's claim for damages, by reason of the alleged failure of plaintiff to finish the frame building in a workmanlike manner. As the bill of exceptions does not pretend to set out the whole of the evidence in the cause, we cannot say that the receipts were not properly admitted by the court. And the judgment is, therefore, affirmed.

RAWLINS *et ux.* *v.* TUCKER.

Where it does not appear from the record, that the giving or refusing to give, instructions, was objected to, at the time, the appellate court will not pass upon their correctness.

A party cannot be permitted to stand by and allow instructions to be given or refused, wait the result of the verdict, and then, for the first time, except to the action of the court in relation to the instructions.

Appeal from the Appanoose District Court.

THIS was an action on the case, for slanderous words spoken. The errors assigned, relate to certain instructions, given and refused by the court. It does not appear that at the time of giving and refusing the said instructions, that any objections were made. After verdict, there was a motion by defendant for a new trial, for the reason that the court erred in giving and refusing the said instructions. This motion was overruled, and judgment on the verdict. Defendant appeals.

Palmer & Trimble, for the appellant.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—If these instructions were properly before us, we should incline to the opinion, that they were not in all respects, as given, correct. We have too frequently held, however, that we cannot notice instructions that come before us as these do, to depart from the rule, whatever the circumstances. Objections must be made at the time they are given or refused, and the record so show, or this court will not undertake to pass upon their correctness. It would not do to permit a party to stand by, and allow instructions to be given or refused, without objection, wait until he sees the result of the verdict, and then for the first time except. The reason of the rule is, that the mind of the court, shall at the time, be called to the objectionable matter, and there have an opportunity to correct it.

Judgment affirmed.

WOODROW *v.* COOPER *et al.*

Where in an action of trespass to real property, the defendants denied the trespass and the plaintiff's rightful possession of the premises, and averred title in one of the defendants, which was denied; and where the plaintiff gave in evidence, a lease of the premises from the defendant in whom title was pleaded, and proved that he was in possession of a portion of the same at the time of the trespass, and that the defendants entered, and chopped down and hauled off a number off trees; and that plaintiff was damaged thereby; and where the defendants thereupon moved for a nonsuit, because of the insufficiency of the testimony to convict the defendants, which motion was sustained: *Held*, That the plaintiff was entitled to at least nominal damages, and that the motion to nonsuit the plaintiff, was improperly sustained.

Appeal from the Polk District Court.

THIS suit was to recover damages for an alleged trespass by defendants, on lands in possession of plaintiff, by cutting down trees and hauling the same away. The answer of defendants denies the trespass—denies that plaintiff had the rightful possession of the premises, at the time the trespass

is alleged to have been committed—and pleads title in the premises in Erasmus Cooper, one of defendants. To this there was a replication, denying the answer, and issue joined. On the trial, plaintiff gave in evidence a lease from Erasmus Cooper to plaintiff, and proved that the premises in petition mentioned, on which the trespass is alleged to have been committed, was part of the farm leased; that plaintiff was in possession of a portion of the premises leased, at the time of the trespass; and that during the term of the lease, defendants entered on the premises in petition mentioned, and in possession of the plaintiff, and chopped down and hauled off a number of trees, "and that plaintiff was damaged thereby." This was all the evidence, whereupon defendants moved the court, "to nonsuit the plaintiff, for the insufficiency of the testimony to convict the defendants," which motion was sustained by the court, and judgment rendered for defendants. To which ruling of the court, plaintiff excepted.

No appearance for the appellant.

J. C. Knapp, for the appellee.

STOCKTON, J.—The error assigned is, that the District Court sustained defendants' motion to nonsuit the plaintiff, and rendered judgment for defendants. There has been no appearance in this court for the appellant, and the argument on the part of the defendants, has been confined to the question of power in the court to direct a nonsuit. On that point, we do not entertain any doubt. But the question in this case is, whether the power was properly exercised by the District Court? The motion, as appears from the bill of exceptions, was based on the alleged insufficiency of the evidence to convict the defendants. It is shown that defendants entered upon the premises in plaintiff's possession, and cut down and hauled off a number of trees, "whereby plaintiff was damaged." It was proper, we think, for this evidence to have gone to the jury, and to have been passed

upon by them. If the defence rested on the fact, that one of defendants was the owner of the premises, and had leased the same to plaintiff, and still claimed and exercised the right to cut timber off the land, and that plaintiff was not thereby damaged; the safer, and more approved course would have been, to have submitted the cause to the decision of the jury, with instructions as to the law, in its application and bearing upon the rights of the parties. Being as we are, left to conjecture, as to the reasons of the court for ordering the nonsuit, we can only say, that it appears to us, that the plaintiff under the evidence, was entitled to at least nominal damages, and, so judging, we are of opinion, that defendants' motion was improperly sustained. The judgment of the District Court, will, therefore, be reversed, and cause remanded.

Lewis *v.* Detrich.

Where it appeared from the transcript of a case, that various instructions were given to the jury, but at whose instance was not shown, and the instructions were not signed by any judge, nor were any exceptions taken, and where was found among the papers in the case, a loose paper, purporting to be a bill of exceptions as to one instruction, but the paper was not dated, or marked filed, nor certified to be a paper in the cause;

Held, 1. That the appellate court would not examine the instructions appearing in the transcript, for the reason that no exceptions were taken at the time of giving the same.

2. That the paper called a bill of exceptions, could not be treated as a part of the record; and that this court will not act upon a paper so destitute of every mark of identity.

Judgment affirmed.

Ellis v. The State of Iowa.

Under the Code, the Supreme Court possesses no power to review an order or judgment in a criminal case, unless it is brought up by writ of error, as prescribed by section 3088.

In criminal cases appealed from a justice of the peace to the District Court, the defendant is not entitled to a trial on the merits, where the District Court finds that there was no error in the proceedings of the justice.

Judgment affirmed.

Gribble v. The State of Iowa.

The failure of a justice of the peace, where a party is charged with threatening to commit an offence against the person or property of another, to reduce the evidence to writing, and cause the same to be subscribed by the witnesses, as required by section 2781 of the Code, furnishes no good reason for dismissing the proceedings, on motion, in the District Court.

The jurisdiction of the District Court, in such cases, is in no sense in the nature of an appeal from the judgment or decision of the justice.

The justice, if he requires the defendant to give security to keep the peace, will be presumed to have exercised his authority properly.

The inquiry in the District Court is as to whether there is *still* any just reason to fear the commission of an offence against the person or property of the complainant.

In the District Court the fullest investigation may be had, and neither party is restricted to the evidence given before the inferior court.

Where in a proceeding to require a party to keep the peace, the defendant moved the District Court to dismiss the proceedings, on the ground that the justice had not written down the testimony as required by law; which motion was overruled; and where the evidence of the complainant was in writing and returned to the District Court, and it did not appear from the transcript of the justice, that any other witnesses were examined: *Held*, That it did not appear from the record, that the justice had not reduced all the evidence to writing; and this court must presume that the justice had done his whole duty.

Where in a proceeding to require a party to keep the peace, it was adjudged in

the District Court, that the defendant be discharged from his recognizance, upon the payment of costs, and thereupon the defendant moved to retax the costs, for the reason "that the costs, on the hearing in the District Court, could not be taxed against him, he having the right to such hearing upon written testimony, by law required to be sent up by the magistrate," which motion was overruled: *Held*, That the motion could not be sustained on the ground assigned.

And in such a case, if the defendant is entitled to be discharged in the District Court from his recognizance, he is equally entitled to be discharged from the costs made in that court. If bound over by the justice, the costs before that officer, are properly chargeable to him, even though he may be discharged in the District Court.

Error to the Lee District Court.

On the complaint of Joshua Day, the defendant was arrested, and being brought before a justice of the peace, and the evidence heard, was required to give security to keep the peace. The proceedings being returned into the District Court, at the next term, the defendant appeared and moved the court to dismiss the proceedings, on the ground that the justice had not written down the testimony, as required by law.

The motion to dismiss having been overruled, the court heard the proofs and allegations of the parties, and adjudged that the defendant be discharged from his recognizance, upon the payment of costs, taxed by the clerk, at $52.65. It appears, from the bill of exceptions, that "the defendant then moved the court to retax the costs, on the ground that the costs of the hearing in the District Court, could not be taxed against him, he having the right to such hearing upon written testimony, by law required to be sent up by the magistrate." This motion being overruled by the court, the defendant excepted, and the refusal of the court to allow the motion, is assigned for error.

F. Semple, for the plaintiff in error.

Clarke & Henley (for the attorney-general), for the state.

Springer, J.—The Code, section 2781, requires that the

evidence before the justice shall be reduced to writing, and subscribed by the witnesses. If the justice fails to carry out this provision of the Code, whatever other remedy defendant may have, we do not see that such failure furnishes any good reason why the proceedings should be dismissed when brought into the District Court. The jurisdiction of the District Court, in such cases, is in no sense in the nature of an appeal from the judgment or decision of the justice. He will be presumed to have exercised his authority properly, if he requires defendant to give security to keep the peace. The inquiry in the District Court is, as to whether there is still any just reason to fear the commission of an offence against the person or property of complainant? and upon hearing the proofs and allegations, the court may either discharge the undertaking entered into by defendant, or may require a new one, for a time not exceeding one year. Code, section 2789.

In the present case, we do not see anything in the record, from which we can conclude that the justice did not reduce to writing all the evidence given before him. The evidence of the complainant is in writing, and was returned to the District Court. That any other witness was examined, and their testimony not reduced to writing, does not appear from the transcript of the justice, and is not otherwise shown by defendant. We cannot say that the justice has not reduced to writing the testimony of all the witnesses examined before him. If the justice does not send up all the depositions and papers in the cause to the District Court, the defendant may, by rule, compel their production. The court cannot presume that the justice has not done his whole duty.

Viewing this motion in the sense of a motion to discharge the defendant, without requiring him to pay the costs incurred in the District Court, if allowed at all, it must be for some other reason than that assigned in the motion. We know of no reason why the District Court should be confined to the testimony written down by the justice. The Code does not require it, nor did the defendant insist on such a

course in the District Court, or make any objection to the introduction of oral testimony. If either party desires it, the fullest investigation made be had; nor can we see that either reason or justice requires, that the parties should be restricted to the testimony given before the inferior court. The law provides that the defendant must appear at the next term of the District Court, and abide the order of the court. If he does not so appear, and the complainant does, the court shall forfeit his bond, and order it to be prosecuted. If neither party appears, the undertaking is discharged at the defendant's costs. The law is silent upon the subject of costs, where a trial is had in the District Court, and there does not appear to be any good reason for requiring defendant longer to give bond to keep the peace. The costs before the justice are properly chargeable to defendant. Of this, we do not understand him to complain. He objects, however, to being required to pay the costs in the District Court, when that court had found in his favor, that there was no just reason to fear that he would commit the offence alleged, and ordered him to be discharged from his bonds. We think the objection is well founded. If the defendant is successful in the District Court, he should not be burthened with the costs of the trial. The two questions cannot well be separated. If he is entitled to be discharged from his bonds, he is on the same ground, entitled to be discharged from the costs in the District Court; the one judgment is an incident of the other.

The judgment of the District Court is, therefore, reversed, and defendant should be discharged on the payment of the costs incurred in the justice's court.

WRIGHT *et al.* v. LECLAIRE.

Courts of equity are within the spirit, if not the words, of statutes of limitations.

In many, and perhaps most cases, they act upon the *analogy* of the limitations at law, while in others, they act not so much in analogy, as in *obedience* to such statutes.

The fourth section of the statute of limitations, approved February 15, 1843, is not applicable to a suit in chancery to enforce the specific performance of a contract to convey real estate.

Actions in chancery to enforce the specific performance of contracts relating to realty, are not barred by a lapse of six years after the right or title accrues.

Such actions must be governed by the seventh section of the limitation act of 1843, which limits the right of action to twenty years, unless the case comes within the proviso of that section.

In such actions generally, the statutory bar for commencing actions at law relating to real estate, is the guide; but the relief may be denied, even when a less number of years may have elapsed, and it may be granted where the time is greater.

In cases of concurrent jurisdiction, courts of equity, equally with courts of law, are bound by the statute of limitations, and may be said to act in obedience to such statute; and in such cases, a change of forum, will not extend the time for commencing the action.

In cases where the jurisdiction is not concurrent, courts of equity apply the statute of limitations in many, and indeed most instances, to equitable titles, by way of analogy to the law.

Courts of law do not possess concurrent jurisdiction with courts of equity, to enforce the specific performance of contracts.

The rule, that where a party has concurrent remedies, he cannot, by a change of forum, extend his right to commence his action, applies only where the party seeks in equity, by reason of some peculiar circumstances, to obtain or recover that which might be recovered at law.

A suit to enforce the specific execution of a contract to convey real estate, is just as much an action to recover the land, as an action of ejectment is, where the party relies upon his legal title.

After service, or voluntary appearance, a party to a suit is in court, and must take notice of what is done therein up to the time of final judgment, and by all such proceedings is bound; but after judgment, he is not further bound to take notice.

After judgment, the case, and the necessity for the presence of the party, is presumed to be at an end; and if the opposite party would take any further step, he must give his adversary an opportunity to be present, and be heard.

To set aside a judicial sale, on motion, without notice, or showing that the op-

posite party voluntarily appeared, in no manner binds the latter, and the party making the motion, can derive no advantage therefrom.

On the 14th of December, 1840, L. C. sold to G. out-lots 25 and 26, in L. C.'s second addition to the town of Davenport, and executed to G. the usual bond for a conveyance, by good and sufficient warranty deed. G. was to pay $500 for the lots; $75 of which was paid at the time, $150 to be paid on June 1, 1841, and the balance in two equal installments, in twelve and eighteen months from the date of the contract. G. never resided in this state, nor have his heirs resided here since his death. G. died in Ohio, July 9, 1844, leaving eight children, all of whom, except one, were minors, and three were still minors on the 25th of April, 1834. At the October term, 1842, of the Scott District Court, L. C. brought suit against G. for the unpaid purchase money due on the bond, to which the defendant appeared by attorney, and a judgment by *nil dicit* was rendered in favor of L. C. at the June term, 1843, for the sum of $464.20, the amount of the principal and interest due on the lots. On the 10th of July, 1843, an execution issued on this judgment, and on the 26th of August following, the sheriff, by virtue of said execution, sold, and L. C. purchased, the southeast quarter of section 14, township 78, range 4, for $373.33, and said out-lots 25 and 26, for $66.66 each. This sale was made under the valuation law of 1843. At the March term, 1844, without notice to G. a motion was made by L. C., to set aside this sale, the cause for which is not shown; which motion was sustained, and a new execution ordered. On the 26th of March, 1844, a second execution issued on said judgment, under which the sheriff sold, and L. C. purchased the quarter section above described, for $270; the two lots for $65 each; and lot four in block 63, for $124, making in all $514. At the time of the second sale, the judgment, interest and costs (including the costs on the first execution), amounted to $523.31. When the first sale was set aside, no order was made as to which party should pay the costs attending the same. L. C. receipted the execution in full, for his judgment and interest. The property not being redeemed, the sheriff executed to L. C. a deed for the property. Lot four in block 63, was sold and conveyed by L. C. to G. There is no evidence to show that G. was in this state, subsequent to May, 1841. About the time of G.'s death, his widow and the older children, knew something of his having purchased certain lots of L. C. in Iowa, but had the impression that their rights were forfeited by neglect, or failure to make payment, and had no expectation of any benefit therefrom, until about April, 1854, when one of the heirs first visited Davenport on other business. It does not appear positively, that the widow and children of G. had knowledge of the bond to convey the out-lots, at the time of his death, or that they possessed such knowledge for more than six years prior to April 25th, 1854. In April, 1854, the heirs of G. in writing, demanded of L. C. a specific performance of the contract to convey the out-lots, at their own costs, and offered to pay all sums of money that might be owing on the contract. L. C. refused to convey. For some years after the contract with G. property in Davenport depreciated, but it has since greatly increased in value. On a bill filed by the heirs of G. to compel a conveyance;

Held, 1. That the complainants were not barred by the lapse of six years after their right or title accrued, from prosecuting their suit.

2. That the judgment against G. and the sale of the premises, under the same, did not extinguish the right of the complainants to call for a specific performance of the contract.

3. That L. C. having elected to hold G. to a performance of the contract, by suing on the notes and collecting the money, held the lots in trust for the complainants, and should be required to convey the same.

4. That G. having appeared by attorney in the suit at law on the notes, his heirs could not, without a stronger showing than is made in this case, go back of the judgment, and show that it was rendered for too much.

5. That the first sale on execution having been set aside, without notice to G., L. C. could derive no advantage thereby, and was liable to the complainants for the amounts bid at that sale, on the property.

Appeal from the Scott District Court.

BILL in chancery to enforce the specific performance of a contract relating to certain out-lots in the city of Davenport. The case was heard on the pleadings, exhibits and depositions, and the issues found for the defendant. From a record covering nearly two hundred pages, we gather that the facts are substantially these: On the 14th of December, 1840, the defendant sold to one John A. Gano (the father of the complainants), said out-lots, being twenty-five and twenty-six in his second addition to the town of Davenport. He executed to Gano the usual bond for the conveyance of these lots, by good and sufficient warranty deed. Gano was to pay for the lots five hundred dollars, seventy-five of which was paid at the time, one hundred and fifty dollars to be paid on the first day of June, 1841, and the balance in two equal installments in twelve and eighteen months, from the date of the contract. Gano never resided in this state, nor have his heirs, the complainants herein. Gano died on the 9th day of July, 1844, in Cincinnati, Ohio. The complainants were never in this state, after the death of their father, until the year 1853, and this suit was commenced in April, 1854. At his death, he left eight children, all of whom were minors except one, and three were still under age at the time of the commencement of this suit. There is some testimony tend-

ing to show, that defendant received the sum of seventy-five dollars on this contract, in the spring of 1841, but not sufficient to overcome the sworn denial of the payment made in the answer.

At the October term, 1842, of the Scott county District Court, defendant brought suit against Gano, for the unpaid purchase money due on this bond. To this suit, defendant appeared by his attorney, and a judgment by *nil dicit* was rendered in favor of plaintiff, at the June term, 1843, for $464.20, the amount of the principal and interest of the remaining payments due on said lots. On the 10th of July, 1843, an execution was issued on this judgment, and on the 26th of August next after, by virtue of said execution, the sheriff sold, and the defendant purchased, the following property of said John A. Gano, for prices following: southeast quarter section 14, township 78, range 4, for $373.33⅓; and said out-lots 25 and 26, for $66.66 each. This sale was made under the "valuation law," of 1843. At the March term, 1844, without notice to Gano, a motion was made by Leclaire, to set aside this sale, which was sustained, and a new execution ordered. The cause for setting it aside, is not shown. We infer, however, that it was because the property was sold under said "valuation law," such sales having been held irregular about that time by our courts. And then afterwards, on the 26th of March, 1844, a second execution issued on said judgment, and thereunder the sheriff sold, and the defendant herein purchased the following property of said Gano, for prices following. The quarter section before mentioned for $270; the two out-lots for 65 dollars each; and lot 4, block 63, for 124 dollars, making in all 514 dollars. At that time, the judgment, interest and costs (including the costs on the first execution), amounted to $523.31. When the first sale was set aside, no order was made as to which party should pay the costs attending the same. The amount of such costs is not conclusively shown, but the probable amount is $9.26. The plaintiff in that suit, receipted the execution in full for his judgment and interest. This property was not redeemed, and in due time the sheriff exe-

cuted to him a deed in proper form. In April, 1854, and before the commencement of this suit, the complainants in writing, demanded of defendant the specific performance of said contract of December, 1840, at their own costs, and offered to pay any and all sums of money that might be due or owing on said contract. The performance was refused, and their right to ask the same denied. There is nothing to show that Gano was in this state subsequent to May, 1841. The weight of the testimony is, that at or about the time of Gano's death, his widow and the older children, knew something of his having purchased certain lots of Leclaire in Iowa, but had the impression that their rights were forfeited by neglect or failure to make payments, and had no expectation of any benefit therefrom, until about the time of the commencement of this suit, when one of the heirs first visited Davenport, on other business. Lot 4, block 63, sold on the execution aforesaid, was sold by the defendant to Gano, for which he held his deed. That the children or widow had knowledge of this bond or contract to convey, at the time of his death, is not positively shown; nor is it shown that they had such knowledge more than six years prior to the commencement of this suit. For some years after the contract with Gano, property in Davenport greatly depreciated in value, but within the last five or six years it has greatly appreciated, and the property now in controversy has become quite valuable.

The court below dismissed the bill, at the costs of complainants, from which decree they appeal.

G. S. C. Dow and *W. E. Leffingwell*, for the appellants.

Whitaker & Grant, and *Cook & Dillon*, for the appellee.

WRIGHT, C. J.—To defeat the plaintiff's action, and sustain the decree below, the appellee relies upon two grounds: *First*, the statute of limitations, which he sets up by plea, supported by an answer; and *Second*, that by the judgment, execution and sale, the right of the complainants to call for a specific performance was extinguished.

This case was before this court at the December term, 1854. At that time, defendant had set up his defence of the statute of limitations, to which there was a demurrer. This demurrer having been overruled by the court below, complainants appealed, and this court held the demurrer well taken. The cause being remanded, the same defence was again set up—demurred to—and demurrer overruled. When the former decision was made in this court, an application for a rehearing was made, which is still pending. The parties having prepared their case, and had a hearing on the merits since that time, it now comes before us for final adjudication, the defendant treating his argument herein as if made also on his application for a rehearing.

The decision before, only covered the question raised by the statute of limitations, and defendant now insists that it mistakes the law, as also the facts. It is true, that one ground upon which the demurrer was sustained was, that as the statute of limitations of 1843, did not commence running until after the death of Gano, the heirs, if minors, and out of the state, were saved by sections 7 and 8 of that statute. This was evidently based on a mistake in fact, for the bill and all the testimony shows, that he died more than a year after the taking effect of the statute. In addition to this, however, defendant insists that the former opinion misapprehends the time when the statute began to run against Gano or his heirs, that time being, as is now urged by appellee, from the date that he had a *right* to demand a deed, and not from the time of *making* such demand.

If we should grant defendant's position in this respect, however, he would not be aided, unless we should concur with him in still another and more important question involved in this part of the case. In delivering the former opinion, HALL, J., says, "that the 4th section of the act of 1843, does not apply to this class of cases—that the capital circumstances of the contract was the land. Gano contracted for the land, and Leclaire agreed to convey land, not to pay money," and he, therefore, concludes that *six years* is not the limitation applicable in such cases; but that it must be gov-

erned by the 7th section, which limits the right of action to twenty years after the right or title accrued. If this is the law, then it is manifest that all other questions, such as the minority of the complainants, when the statute commenced running, and matters of that character, become unimportant, for there is no pretence that the twenty years had expired when this action was commenced. And our opinion is, that this is the law. We hold it to be the law, in the first place, because it has been so declared by this court, after what is conceded to have been a full argument, covering in its range many of the adjudicated cases; and in the second place, because it fully accords with our own convictions, and as we believe, the strong current of the decisions of other courts.

We recognize the rule, that courts of equity are within the spirit, if not the words, of the statute of limitations. In many, and perhaps most cases, they act upon the *analogy* of the limitations at law; while in others, they act not so much in analogy, as in *obedience* to such statutes. But if we concede that in such cases as the one before us, equity will act in *obedience* to the statute (of which we shall speak hereafter), it would not advance the argument; for to give this view pertinency, it must be taken for granted, that this case comes within the terms of the 4th section of the act of 15th February, 1843. Acts of 1843, 384. If that is granted, then the argument is, that inasmuch as six years is the time therein fixed for commencing an action at law, you cannot by changing the forum, extend or change the time. But it is denied that it does come within the terms of that section, and here is where the controversy hinges. It will not, therefore, do to admit or take that for granted which is denied, and upon that assumption base the argument.

The material portions of sections 4 and 7, are as follows: The first provides, "that every action of debt or covenant for rent, or arrearages of rent, founded upon any lease, under lease, or every action of debt or account, founded upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, on the delivery of property, or the performance of covenants, and every action of

assumpsit, shall be commenced within *six* years after the cause of such action shall have accrued, and not after," &c.

The second provides, "that every real, possessory, ancestral or mixed action, or writ of right, or action of ejectment, brought for the recovery of any lands, tenements or hereditaments, shall be brought within *twenty* years next after the right or title thereto, or cause of such action accrued, and not after," &c. In construing these two sections, we first remark that there is perhaps no statute of limitations in any of the states but has provisions similar to these. By this, we mean, that all of them fix a different time within which to commence actions, which are personal, or for the recovery of money, and those which relate to lands. As a general thing, the time is longer in the latter, than in the former class of actions. And another thing is equally true in all the states, that in bonds for the conveyance of lands, or the performance of covenants, the party may either proceed in equity for a specific performance, or sue at law for his damages resulting from a breach of such covenants. And, notwithstanding this, we know of but few, if any cases, in which it has been held that a party was barred of his right to claim a specific performance, because the six or eight years (as the statute fixed it), had elapsed within which to bring the action of debt or covenant.

Some of the cases referred to by defendant's counsel, we have been able to examine; to others we have not had access. One case, is that of *Watkins* v. *Harwood et al.*, 2 Gill & Johns. 307. In that case, the administrators of Harwood, against the claim of plaintiff (Watkins), preferred against the estate, set up a mortgage given by the plaintiff to the decedent, and claimed that they had a right to retain the amount thereof, out of the distributive share which said plaintiff was, in her suit, claiming of the estate. By the law of that state, a debt due by specialty, was barred after a lapse of twelve years. The debt due by the mortgage, became due and payable more than sixteen years before the death of Harwood, the mortgagor. The question arose, whether the plea of the statute of limitations ought to be allowed? In the argument,

counsel in support of the plea, refer expressly to the fact that the mortgagee (or his administrator) was not attempting to enforce his lien, but were using the mortgage as a set-off, or a mere evidence of debt. And in the opinion, the court lays stress on the fact, that "it is not a proceeding to foreclose, or in any shape against the thing itself." And inasmuch as it was a mere claim of a debt, it was held that the plea was good, whether the question arose at law or equity. But we feel justified in saying, that if the proceedings had been to foreclose the mortgage, or "against the thing," or property mortgaged, the plea would have been held bad. This is evident, both from the argument and opinion. This case, then, does not aid defendant.

The People v. *Everest*, 4 Hill, 71, is a brief case, and arose upon the default of the defendant as sheriff, to return an execution. It is very imperfectly reported, and without any necessity, as far as we can see, proceeds to state, that while the general statute of limitations has no application, *eo nomine*, to a bill in equity, even where that is concurrent with the remedy at law, yet courts of chancery always allow it to be pleaded in such cases; for the reason that the party should not be allowed to evade its effect, by resorting to another forum. Giving to the dictum, however, its fullest force, it weighs but little in this case, because the whole controversy here is, whether the equitable is concurrent with the legal remedy, which is by no means conceded, and which is not true in fact.

The next case is that of *Lawrence et al.* v. *The Trustees of, &c.*, 2 Denio, 577. This case is fully reported, and instead of sustaining defendant's position, establishes the contrary doctrine. Without stating the facts, we shall give such extracts as more immediately bear upon this question: "If the matter in controversy in a court of chancery, is of a purely equitable nature, not cognizable in a court of law, the statute of limitation has no application, but the court will apply the doctrine of neglect and lapse of time, according to discretion, regulated by precedents and the peculiar circumstances; but where the two courts have concurrent jurisdiction, and also

where the aid of equity is invoked on account of special circumstances, such as the need of discovery, the difficulty of proceeding at law, or the like, the statute is as effectual a bar as at law," referring to *Hambert* v. *Rector of Trinity Church*, 7 Paige, 195; *Roosevelt* v. *Mark*, 6 Johns. Ch. 289; *Burdine* v. *Sheldon*, 10 Yeager, 41, and other authorities. And again, "if the present claim is one in which a court of law has concurrent jurisdiction with courts of equity, this suit was barred by the statute of limitations;" but, proceeds the vice-chancellor, "the remedy was limited to a suit in equity," where alone the assets of the deceased in such cases could be pursued, and, therefore, upon principle, there was no ground for holding that there was such delay in filing the bill as to deprive the complainants of relief. The plea of the statute was overruled, and the decree was afterwards approved, on a hearing before the chancellor. The same general doctrine may be found in 2 Story's Eq. Jur. § 1520, and the note.

The case of *Smith et al.* v. *Carney et al.*, 1 Little, 295, is more in point, and seems to favor the doctrine contended for by defendant; it was decided in 1822, and the concluding part of the opinion is as follows: "If then, the statute would have operated as a bar to an action at law, founded upon the contract, it would seem to follow, that it must operate equally as a bar to a suit in equity, founded upon the same contract; for a court of equity is as much bound by the statute as a court of law. In fact, in all cases, the same rules of propriety, (property?) and the same rules of decisions, govern both courts; and it is, therefore, a settled rule that a court of equity will not decree the specific execution of a contract, upon which a court of law will not give damages."

We must be permitted to say, that the conclusion is not justified by the premises. Because the same rules of decision govern both courts, it by no means follows that it is a *settled rule*, that a specific execution of a contract will not be decreed, because the time to claim damages in a court of law has elapsed. To satisfy us that it is a *settled rule*, we should want more than the conclusion drawn from insufficient premises, unsupported by reference to any authority. "It would

seem to follow," says the opinion, but the question is, *does* it follow? If it does, then we acknowledge that we misapprehend the current of authorities in all the other states, as far as examined. Some of these authorities, we propose to briefly examine, remarking before leaving the other authorities cited by plaintiff, that most of them merely recognize the general rule that courts of equity will act in analogy, if not in obedience to the statute, or relate to the doctrine of technical, continuing and express trusts. Such are *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Beckford* v. *Wade*, 17 Vesey, 95; *Banks* v. *Judah*, 8 Conn. 145; *Hovenden* v. *Annesly*, 2 Sch. & Lef. 630; 2 Story's Eq. Jur. § 1520.

Let us, then, briefly refer to some of the authorities that not only *seem* to, but *do* settle the rule, different from what would appear to be laid down in 1 Littell, *supra*. The statute of limitations does not apply in the case of a vendee bringing a bill for the specific performance of a contract. The only question as to time, is a question of diligence. *Washburn* v. *Washburn et al.*, 4 Iredell's Eq. Cases, 306.

If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been. *Lamb* v. *Clark*, 5 Pick. 198; *Bedell* v. *Janney et al.*, 4 Gilm. 193.

Where a debt is secured by the assignment of a mortgage, the security is not impaired by the statute of limitations barring a recovery on the note. *Cullum* v. *Bank of Mobile*, 23 Ark. 797; *Belknap* v. *Gleason*, 11 Conn. 160; *Miller* v. *Helm*, 2 S. & Marsh. 687. The shortest period which a court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitations at law, is twenty years. *Vanck* v. *Edwards*, 1 Hoff. Ch. 382; *Hawley* v. *Cramer*, 4 Cow. 718.

Walton v. *Coulson*, 1 M'Lean, 120, is a well considered case, and after examining several cases decided in Tennessee, the court say: "From these decisions, it does not appear that the Supreme Court of Tennessee, have decided that the statute operates as a bar to the specific execution of a contract, by an heir, on whom the real estate has been cast by

the decease of his ancestor. Such a decision would be so novel in its character, and injurious in its consequences, that we should require a clear adjudication, fixing such a construction of the statute, before we could consider it as the law of this state." And again, we know that courts of equity have frequently granted relief in this class of cases, where the bill has been filed long after the statutory bar to an action at law to recover damages, would avail. In many instances, perhaps, the defence was not urged. This is true, and the fact that it was not, if not an affirmative, is at least a strong negative argument, that it was not a bar. Indeed, we can find but few of the many cases on the subject of specific performance, where this defence was urged. Even where the time had passed at the time of the commencement of the suit for the recovery of damages, relief has been granted in such cases, twelve, fifteen, twenty, and even a greater number of years, after the conveyance should have been made. Generally, the statutory bar for commencing actions at law relating to realty, will be the guide; but the relief may be denied, where a less number of years even may have elapsed, and it may be granted where the time is greater. Each case must stand on its own circumstances. If, however, there are no peculiar circumstances, the legal bar governing real actions will apply. *Baker* v. *Morris*, 10 Leigh, 284; *Getchell* v. *Jewett*, 4 Greenl. 350; *Kinna* v. *Smith*, 2 Green. Ch. 14; *Hawley* v. *Cramer*, 4 Cowen, 743; 2 Story's Eq. Jurisp. § 747; *Elmendorf* v. *Taylor*, 10 Wheat. 168; *Baker* v. *Whitney*, 3 Sumner, 475; *Miller* v. *McIntire*, 1 McLean, 85; and same case in 6 Peters, 62. This doctrine is expressly recognized in Angell on Limitations, § 26, and 2 Story's Eq. Jur. § 1520, where it is said, that if a legal title would in ejectment be barred by twenty years adverse possession, courts of equity will act upon the like limit, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate." See also Willard's Equity, 293.

Leaving cases, let us briefly look at the question upon principle. The counsel for defendant insist, that complain-

ants are barred of their action, because they have a concurrent legal remedy, and that they cannot by a change of forum, extend their right to commence the action. Such, too, is the general language of the books, and we may deduce from the authorities, these two propositions: First, in cases of concurrent jurisdiction, courts of equity equally with courts of law, are bound by the statute, and they may, therefore, in such cases, be said to act in obedience to such statute. Second, in cases not of concurrent jurisdiction, the statute is applied in many, and indeed most instances, to equitable titles, by way of analogy to the law. *Platt et al.* v. *Northane*, 5 Mason, 112; *Raymond* v. *Simpson*, 4 Blackf. 77; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Murray* v. *Coster*, 20 Johnson, 576; 2 Story's Eq. Jur. § 1520. And hence it is, that in the first class of cases, a change of forum, will not extend the time for commencing the action. Therefore, while under the old practice, at least, cases of account, of fraud, of partition, of dower, and the like, might be brought in either jurisdiction, yet the statute of limitation applied in one court as in the other. *Smith* v. *McIver*, 9 Wheaton, 532. But let us ask, if court of law has concurrent jurisdiction in this case? What relief here sought, could such a court give? There is no change of forum, because there is but one appropriate or proper one. Ever since courts have acted in such cases, the jurisdiction has been exercised by the chancellor. Courts of law have no power to adjudge or to order the specific execution of such contracts. It is true, as already stated, that complainants might have sued for the penalty at law, to recover their damages; but the subject, object and purpose of the contract, was the land. As is said in the former opinion, that is the "capital circumstance." This bond is in the nature of a conveyance. It gives the vendee a certain equitable interest therein. Defendant was the trustee of Gano as to this land, upon the payment of the purchase money, and Gano, as to such purchase money, was a trustee for defendant; and to secure this money, defendant had a lien on the land. 2 Story's Eq. Jur. 789, 790. To enforce this, the principal object and purpose of the contract, the vendee could

only resort to a court of chancery. The jurisdiction is not concurrent, and, therefore, to talk about the bar under the fourth section of the act applying, because the jurisdictions are concurrent, is a misapplication of the term. This rule applies only, where you seek in equity, because of peculiar circumstances, to obtain or recover that which might be recovered at law. A familiar illustration of this rule, is to be found in that class of cases where you go into equity for discovery, and thus give the court jurisdiction of a matter which it would not otherwise have. There the jurisdictions are treated as concurrent, and by thus giving equity jurisdiction, you cannot avoid the statute, if it would apply at law. But once more, and finally on this part of the case, why does not this case come strictly and clearly under the seventh section of the statute, and, therefore, not barred under twenty years, if necessarily then; or if in less than that time, only so, because of the negligence of complainants, showing an abandonment of their claim, or because of some other equitable circumstances entitled to weight? It is an action to recover the land, just as much as an action of ejectment is, where a party relies upon his legal title. If the defendant was paid for this land, it may well be doubted, whether even twenty years would bar the action, upon the principle well recognized in the books, that the statute does not apply in such cases of trust. But waiving that, it is conceived, that if the complainants are otherwise entitled to relief, they should not be barred their action in six years, any more than if they had a deed, and brought ejectment, or had a mortgage and sought to foreclose; because in such cases, they might and should have brought covenant on the deed, or assumpsit, or debt, on the note secured, within a less number of years than that fixed for the ejectment or foreclosure proceedings. This action is brought to recover the land—to test the title in effect. It is in effect, a real action. Complainants have the equitable, and seek to have defendant convey to them the legal title, which they say is theirs, and which he holds as a mere trustee for them. To hold that their right of action is barred after the lapse of six years, to our minds, would be doing

violence to the spirit, as well as the letter of the statute, as well as what we understand to be, the almost uniform current of decisions in all the states.

If it appeared that there had been great *laches* on the part of complainants; that valuable improvements had been made upon the land; that defendant, relying upon his right, had parted with the title, or from any circumstances it would be inequitable to enforce the contract, the argument of *lapse of time*, which is always considered in such cases, would have weight. No such considerations arise here, however. The minority of the complainants, their non-residence, their ignorance of their rights, the prosecution of their claim so soon as known, excuse and explain the delay. And while these might not, under the circumstances of the case, prevent the running of the statute of limitations, or avoid the bar, if the whole time had elapsed, they are always to be considered to excuse apparent laches, and avoid the argument resulting from lapse of time. We conclude, then, that the first position of defendant, is not well taken, and with the remark, that the novelty of the question in this state, and its full argument on the petition for a rehearing, as well as on the case at bar, must be the excuse for what might otherwise appear an extended and prolix discussion of the question, we pass to the second ground of defence.

Did the sale under the judgment obtained by Leclaire, extinguish the right of the complainants to these lots? This question we also feel constrained to answer in the negative. If defendant had bought this property on the execution in satisfaction of his whole debt, or if he had thus only received a portion of his claim, and had not otherwise, either by payment in money, or the sale of other property, received any part of the purchase money, we should perhaps hold the title of complainants extinguished by such sale. But it is an entirely different question, when he has received in money and other property, almost five-sixths of the purchase money. Treating the last sale as the valid and binding one for the present, it appears that with the seventy-five dollars paid at the time of the contract, he has received thereon,

aside from the out-lots in controversy, $468; the whole debt being five hundred and ninety-eight. He has then been paid all but one hundred and thirty dollars of the purchase money, and insists that he is entitled to that, and also the lots. If this is correct—if this is equity—then indeed have we failed to understand the fundamental principles upon which equity is administered. But if it is his right in equity, then we have nothing to do but to so determine, however hard it may seem; for hard cases should not make *bad equity*, any more than *bad law*. Let us see whether it is his right, or whether equity can do, without violence to any rules, that which justice would seem to dictate.

While there are certain leading rules, that must obtain in the decision of all cases, and which cannot be disregarded, yet it is equally true that, in a court of equity at least, each case must be determined to a certain extent, upon its own peculiar circumstances and equities. And, therefore, it will not do, as in the argument at bar, to lose sight of the relations of these parties, and their respective duties and obligations. Say counsel, for instance, "suppose some other creditor of Gano's had sold and purchased his interest in these lots by judicial sale, would this not have extinguished his right to the same, if he failed to redeem?" Grant it, and does it therefore follow that the same is true, if defendant purchased? In the case supposed, there is no contract outstanding, or obligation on the purchaser to convey these lots. In the case at bar, there is such an obligation; and if, by purchasing in Gano's interest, he thereby extinguishes all right in him to the lots, then the same would be true, whether he purchased before or after the time he was bound to convey, though there might have been a strict performance on the part of Gano. Would counsel contend that because a stranger to this contract, might thus extinguish or defeat Gano's right to the property, therefore Leclaire could, in the same manner, relieve himself from his obligation to convey the land, by purchasing *before* the maturity of the bond. We think we may safely say, not. What difference does it make, then, whether he purchases before or after the

time he was to convey? If the complainants' rights are otherwise perfect, how can the purchase by him, affect them? Suppose he had received the whole purchase money, and had never conveyed, with his obligation to convey outstanding, could he satisfy his bond, and defeat their right to a deed, by purchasing their equity at a judicial sale? This undertaking is to make to the vendee or his heirs, a good and sufficient warranty deed, upon the compliance on their part with certain conditions, and though he might buy in ever so many equitable or legal titles, his obligation is the same; and these rights are co-extensive with his obligation. Let us suppose, that the whole purchase money had been paid at the time of the contract, and that the conveyance was to be made on the happening of some other event. Could defendant on the happening of the contingency, be excused from conveying, upon the ground that he had at a judicial sale, bought in their right to a deed, or their equity in the lots? He might require that the amount paid by him should be discharged, and insist upon it as a lien, or the lots to be paid for before he parted with the title; but he could not, upon any equitable ground, hold on to the purchase money, and the lots also. Much less can he do so, where he purchases the lots in part payment of the consideration money.

The case of *Grabb* v. *Crane*, 4 Scam. 153, cited by defendant, so far from favoring his view, at least negatively, holds that he cannot by such sale *alone* defeat their rights. There a part of the purchase money was paid, and judgment recovered for the balance. An execution being issued thereon, and returned no property found, the vendor filed his bill setting out these facts, and concluded with a prayer for the sale of the lands in satisfaction of said judgment. Defendant was served, the bill taken *pro confesso*, and a decree in accordance with the prayer. The defendant then filed his bill of review, which was demurred to, and demurrer sustained. The writ of error was prosecuted to the decision, sustaining said demurrer. Defendant (or complainant in the bill of review) claimed that the vendor was bound to execute a deed to the vendee, and then, and not until then, levy his

execution on the land. The court say, "doubtless he might have done so, but he was not necessarily required to resort to that particular remedy. In this, as in many other cases, the law gives a choice of remedies, and he had a right to elect whether he would convey the land, and levy his execution upon it, or file his bill in chancery, and subject it to the payment of his judgment." But nowhere is it intimated, that by a sale, without a previous conveyance, or an order of court, or bill filed, the vendor could divest the vendee of his right to a deed.

Again; it is said, that the purchaser of a tract of land, under an execution sale, acquires all the right and title, whatever it is, which the defendant has in the premises, to the same extent as he would by a voluntary purchase from the party; referring to *Turrey et al.* v. *Saunders et al.*, 4 Scam. 532; *Andrews* v. *Murphy*, 11 Geo. 431; *Boyd's Lessee* v. *Longworth*, 11 Ohio, 252; *Scribner* v. *Lockwood*, 9 Ohio, 186, and other cases. This is true, and particularly so, when applied to third persons, or the extent of that interest; that is to say, if the defendant had a fee simple, leasehold, or other interest or title, that the purchaser at such a sale acquires neither more nor less. But how far is this rule pertinent to this case? The purchaser acquired the right to fulfill the contract and demand the deed. He virtually assumes to pay the money, and then asks to be subrogated to the rights of the vendee. Leclaire, or the vendor, by the law, could do no more, nor yet so much, for as already shown, he could not thus satisfy his bond or undertaking to convey. By purchasing at the sale, he becomes in fact, the vendee as well as the vendor, and while, technically, he may be said to stand in the place of the complainants, or the original vendee, his obligations assumed by his original contract, are thereby none the less binding, nor can he escape from them, if there is otherwise a sufficient compliance on the part of the obligees. He had his election to declare the contract at an end, or to hold Gano to a performance. If he elects to pursue the latter course, as he has, by suing on the notes and collecting the money, he should be held to do as he agreed,

and that is, to convey the lots. The right of Gano and his heirs to redeem, was not only a statutory redemption from a sheriff's sale, but also a right resulting from the relation created by virtue of the contract; an equitable right, based upon equitable principles. The lots remain in his hands; he by his contract, held them in trust for the vendee; and thus being in his hands, a court of equity will lay hold of the subject of the trust, for the benefit of the *cestui que trust*. *Rigley* v. *Casey*, 4 Har. & McH. 198.

We are referred by defendant's counsel, to the case of *Broome* v. *The Missouri Iron Company*, 17 How. 340. This case is in every essential particular different from that. That suit was brought in 1848, to enforce the specific execution of a contract entered into in 1839. The vendee never paid or offered to pay, the consideration money, nor did he in any manner comply, or pretend to comply, with his contract. In addition to this, the property claimed, had been sold several years before the bill was filed, on a judgment obtained against the vendors; and the next year, the vendors executed to the purchaser at such sheriff's sale, a deed for the same property. And afterwards, in 1843, a decree was entered against the vendee, for the purchase money, which the court held was an equitable lien upon the land. The land was decreed to be sold for the payment of the consideration money. It was accordingly sold, and "this proceeding was had," says the court, "*on the ground that the vendee had abandoned his claim to the land.*" Under these circumstances, Justice M'LEAN, in delivering the opinion of the court, might well say, that, "it would be difficult to find any case, where the objections to the specific execution of a contract, are more insuperable than in this case." There, no part of the condition money had been paid; here only a small amount remains unpaid. There, the interest of the vendors in the land, had been sold under execution, as well as by their own voluntary deed, whether with or without notice to the purchaser of complainants' outstanding bond, is not shown. Here, Leclaire still holds the property in his own name. And finally, the interest of the complainant had been sold under

a decree for the purchase money, which was found to be an equitable lien on the land, which latter proceeding was had on the ground, that the vendee *had abandoned his claim to the land.*

This brief reference to the two cases, is sufficient to show that they are in all respects dissimilar, and that nothing is decided in that, which conflicts with the ruling here made. We conclude, therefore, that complainants are entitled to a decree for this land, upon paying the amount due defendant, over and above the amount paid at the time of the contract, and that for which his other property sold. And as to this, complainants claim that their ancestor paid another seventy-five dollars in the spring of 1841. To this, there are two conclusive answers: First, there is no testimony to satisfy us of the payment; and in the second place, the judgment of June, 1843, must be taken as conclusive on that subject. The record of that case, which is made a part of this, shows that defendant (Gano) appeared by attorney; and under such circumstances, it was his duty, if he did not, to plead such payment. Having failed to do so, he cannot, without a stronger showing than is here made, go back of the judgment, and show that it was rendered for too much. *Hamott* v. *Hampton*, 7 T. R. 269; *Loring* v. *Mansfield*, 17 Mass. 394; *Loomis* v. *Pulver*, 9 John. 244; *Carter* v. *Canterbury*, 3 Conn. 461.

The complainants also claim, that defendant should be concluded by the amount of the first sale; that he had no right to have that set aside, on his own motion; and that being concluded by that, he is bound to account for $373.33 for the quarter section of land, and $124, the amount for which lot 4, block 63, sold at the second sale, making the aggregate sum of $497.33; whereas, if the second sale is to be the guide, the same property only sold for $394, making a difference of $103.33. And it will be observed, that this difference arises from the price paid at the first, compared with the second sale, for the quarter section of land.

This motion was made by Leclaire, of which Gano had no notice, nor is there anything to show that he made any ap-

pearance at that time. It was made almost a year after the judgment was rendered, and near seven months after the first sale. It is true, that the record says, "that the case came on to be heard upon a motion to set aside the proceedings of the sheriff upon the execution, &c., *and was argued by counsel*," but this allegation is as true and fully sustained, if the motion was argued by counsel for Leclaire alone, as if argued by counsel for Gano also. So that we conclude that there is nothing to show, that Gano either had notice or appeared voluntarily on the hearing of said motion. Under such circumstances, is he or his heirs bound thereby? and if not, what effect, if any, does the setting aside of that sale have upon their rights? After service or voluntary appearance, a party to a suit is in court, and must take notice of what is done therein, up to the time of final judgment; and by all such proceedings he is bound. But after judgment, he is not further bound to take notice. After such judgment, the case, and the necessity for his presence, is presumed to be at an end, and if the opposite party would take any further step, he must give his adversary an opportunity to be present and be heard. To set aside a sale on motion, without notice, or showing that the opposite party voluntarily appeared, therefore, in no manner binds him, and the party making the same can derive no advantage therefrom. Upon this subject, see *Delpalaine* v. *Hitchcock*, 6 Hill, 14; *Douw* v. *Burt*, 1 Wend. 89; *Eline* v. *Green*, 1 Blackford, 53; *Clamorgan* v. *O'Fallon et al.*, 10 Missouri, 112; *Toler et al.* v. *Ayres*, 1 Texas, 398; *State Bank* v. *Marsh*, 2 Eng. 390; *Bently* v. *Cummins*, 3 Ib. 490; *Clark* v. *Grayson*, 2 Ark. 149; *Sears* v. *Lord*, 2 Gilm. 281.

We conclude, then, that the first sale was improperly set aside. How far this may affect the title to the property so purchased, whether viewed in reference to the first or second sale, is not now to be determined. We only determine that as this sale, under the circumstances, was improperly set aside, the complainants are not bound by such order, and have a right to insist, as they do, that defendant shall be liable to them for the amount of the bid then made, and that

he cannot account to them in this proceeding, for the quarter section, at the price bid at the second sale. We then conclude, that from the amount of said judgment, should be deducted the following sums:

Amount first bid on the quarter section,	$373.33
Amount bid at the second sale for lot 4, block 63,	124.00
	$497.33

And inasmuch as the second sale of the quarter section, was for the reasons above stated, irregular, at least complainants should not be held for the sheriff's commission thereon, to wit: two per cent. on the $270. For all other costs, as far as we can judge from a careful examination of the record, they are properly chargeable. The petition for a rehearing is therefore overruled, and cause reversed and remanded, with instructions to the court below, to render a decree in favor of complainants, requiring defendant to convey to them the out-lots in controversy, upon their paying to him, or the clerk of the court, the amount still due, calculated upon the above basis.

DAVENPORT *v.* WELLS.

Where a party contracts to deliver personal property, for which he has received the price, on a certain day, and refuses so to do, he is liable for the highest price between the day of delivery, and either the commencement of the suit, or the day of trial.

As a promissory note or due bill, payable in personal property, is *prima facie* evidence of indebtedness, or of having received the price, the payor would be liable to the same extent in an action on the note.

Appeal from the Warren District Court.

ON the 27th of April, 1855, Wells gave to Davenport his due bill for seven hundred and sixty-six pounds of flour, and fifteen and a half bushels of bran, made payable on the same

day. On the same day, Davenport demanded the flour and bran, and Wells paid one hundred pounds of flour, but had not the remainder of the articles promised. It is agreed that flour was worth $3.50 per hundred, on that day, and bran six cents per bushel. On the 16th of July, plaintiff again made a demand. The defendant did not deliver the articles, but tendered a sum of money equal to their value, on the 27th of April, at the above prices, with interest. It is agreed that on the 16th of July, flour was worth $5.00 per hundred, and bran the same as on the former day. The plaintiff refused to receive the tender, and brought suit.

The court held, that the plaintiff was entitled to the price as it was on the 16th of July, and rendered judgment accordingly. From this, the defendant appeals.

Clarke & Henley, for the appellant.

P. Gad Bryan, for the appellee.

WOODWARD, J.—The rule is, that when the contractor has received the price, he is liable for the highest price between the day of delivery, and either the commencement of suit, or the time of trial, but which of these, it is not necessary now to determine; and as a promissory note or due bill is *prima facie* evidence of indebtedness, or of having received the price, this case would stand upon that rule. See *Cannon* v. *Folsom*, 2 Iowa, 101; *Foley* v. *McKeegan*, at the December term, 1855, of this court.

When this cause was before the court at the last term, the statement of facts was ambiguous, and led to the supposition that the tender was made on the 27th of April, the day the due bill was made and was due, in which case the former decision was right.

The judgment of the District Court is affirmed.

END OF CASES DECIDED AT THE JUNE TERM, A.D. 1856.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA;

IOWA CITY, DECEMBER TERM, A.D. 1856.

In the eleventh year of the state.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.
" WM. G. WOODWARD, } JUSTICES.
" L. D. STOCKTON, }

GOWER & HOLT *v.* CARTER & SHATTUCK.

An agreement to pay a sum of money by a day certain, and more than legal interest afterwards, by way of penalty, if the debt be not punctually paid, is not usurious.

No other sum can now be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss.

In the case of a loan of money, a promise to pay a penalty beyond the amount of legal interest, cannot be enforced.

No damages for the mere non-payment of money, can ever be so liquidated between the parties, as to evade the provisions of the law which establishes the rate of interest.

Where it appears from the record, that the judgment is greater than the plaintiff is rightfully entitled to recover, the appellate court will correct the error,

although the judgment may have been rendered without objection, or without any effort to correct or reduce the amount of the damages.

Where in an action on three promissory notes, payable respectively in six, nine and twelve months from date, each of which notes contained a provision as follows: "If not paid punctually when due, we promise to pay, as a penalty for the default, two and a half per cent. per month from maturity till paid," to which action, the defendants answered, denying the indebtedness, and alleging that the notes were usurious on their face; and where the plaintiffs demurred to so much of the answer as pleaded usury, which demurrer was sustained by the court; and where the defendants made no further defence, and judgment was rendered against them for the amount of the notes, with interest at ten per centum from their date to maturity, and for the penalty of two and a half per centum per month, from the maturity of the notes to the date of the judgment; and where one of the errors assigned in the appellate court was, that the judgment was for a greater sum than the plaintiffs were entitled to recover: *Held*, 1. That the contract was not usurious; 2. That the agreement to pay the two and a half per centum per month, as a penalty in default of payment of the notes, at their maturity, is not essentially different from an agreement to pay a gross sum as such penalty; 3. That the judgment should have been for the money actually due, without the addition of the penalty.

Appeal from the Johnson District Court.

THIS suit is brought on three promissory notes, each for the sum of $969.91, dated January 30th, 1854, and payable respectively in six, nine, and twelve months from date, with interest until paid, at the rate of ten per cent. per annum. Each note contains a clause in these words: "If not paid punctually when due, we promise to pay as a penalty for the default, two and a half per cent. per month from maturity till paid." The defendants answered, denying generally any indebtedness to plaintiffs in the sum claimed, or any less sum on the promissory notes; and for further answer, they deny they are indebted to plaintiffs for any interest as claimed, and they further aver, "that the said notes, and each of them, are usurious, because they say that the sum of two and a half per cent. a month, stated in said notes, and which it is alleged these defendants promised to pay as a penalty for default for non-payment, for any and all of said notes, when due, was at the time of making said notes, agreed upon by the parties as the rate of interest which said notes should

draw after the same should become due, and was then agreed to be the rate of interest to be paid by defendants to plaintiffs, on the several sums of money named in said notes after the same became due and payable, as the consideration for giving said notes. That there was no further or different consideration agreed upon between the parties, than an indebtedness to the amount of principal stated in said notes, at the time of the execution of said notes by defendants, or for the consideration for the ten per cent. interest; and the interest of two and one-half per cent. per month named as a penalty, and which was intended and agreed upon as interest after the said notes became due. And defendants aver, that said interest is liable to be forfeited by statute in such case made and provided." To so much of the answer as sets up and avers usury in the notes sued on, there was a demurrer sustained by the court, and the cause coming on for hearing on the petition and exhibits, judgment was rendered for plaintiffs for the amount of the notes and interest at the rate of ten per centum per annum, from their date to their maturity, and for the penalty of two and a half per centum per month, from the maturity of the notes to the date of the judgment.

From this judgment, defendants appeal; and assign for error, the sustaining of the demurrer by the court, and the rendering judgment for the penalty of two and a half per centum per month, and for any more than the amount of the notes and ten per centum interest.

I. M. Preston, for the appellants.

All technical forms of pleading are abolished by the Code of Iowa. Section 1734 of the Code, provides that any pleading which conveys to the common understanding a reasonable certainty of meaning, or which by a fair and natural construction, shows a substantial cause of action or defence, shall be deemed sufficient. Now, does the defendants' answer in this case, comply with the requirements of this provision of the Code? We say it does, we say that defendants'

answer is definite, certain, and legal; and in order to give force to the objections taken in the demurrer, you must set aside the express provisions of the Code (§ 1734), together with the universal practice of the courts of this state. To give force to the objections taken by the demurrer, would be requiring greater certainty in pleading usury, than is required in criminal proceedings at this time. The defence of usury set up in this case, is based upon the statute of Iowa. Acts of 1853, p. 67. Especial reference is made to sections 4 and 5, of said act. Section 5 provides, that where the unlawful interest is apparent on the face of the contract, the court shall render judgment of forfeiture, whether suit is defended or not. We say the unlawful interest in this case, is apparent on the face of the notes, and the court should have rendered judgment of forfeiture, even if the defendants had not appeared.

Again, in section 5 of said act, it is provided that where the unlawful interest is not apparent on the face of the contract, the person contracting shall be a competent witness to prove the contract usurious, &c. In this case, the notes call for two and a half per cent. per month, as a *penalty*. We aver in our answer, that this two and a half per cent. was agreed to be paid as interest, and that such was the agreement, and that there was no other consideration. They, by their demurrer admit it, superseding the necessity of proof. Then we say, the court erred in sustaining said demurrer, and rendering said judgment. The word "penalty," expressed in the notes, amounts to nothing upon the question to be decided in this case; and in any case, it is only an indirect way of dodging the word "interest."

The question whether the court erred in sustaining the demurrer to defendants' answer, necessarily includes the other errors assigned. We, therefore, say that if we have taken the correct view of the pleadings and question involved in this case, the court below erred in sustaining said demurrer, and in the rendition of said judgment, and the judgment below should be reversed.

Clarke & Henley, for the appellees.

But a single question is presented by the record in this case, viz: did the court err in sustaining the demurrer to so much of the answer of the defendants as attempted to set up the plea of usury? We say not. Although it may be true that the Code has abolished all special pleading and technical forms, it has not abolished all *common sense;* nor has it changed the substance of things. A pleader *now* must state *substantially* what he was required to allege before under the old system of pleading. And so this court has decided repeatedly. A plea of usury now, to be good, must contain substantially all the material allegations required under the former practice. Let us see, then, what are the requisites of a plea of usury.

1. The plea must aver that there was an agreement to take illegal interest, and that the agreement was corruptly made. *Cohee* v. *Cooper*, 8 Blackf. 115; Story on Contracts, 628; *McFarland* v. *State Bank*, 4 Pike, 44; 1 Wheat. Selwyn, 563; 10 Bac. Abrg. 299, 301.

2. The plea or answer must set out the terms of the usurious contract, the principal sum borrowed, and the interest agreed to be taken or received. *Fay* v. *Grimstead*, 10 Barb. 321; *Gould* v. *Horner*, 12 Ib. 601; *Vroom* v. *Ditmas*, 4 Paige, 526; *N. O. Gaslight, &c., Co.* v. *Dudley*, 8 Paige, 457; *Curtis* v. *Masters*, 11 Paige, 17; *Cloyes* v. *Thayer*, 3 Hill, 565; *Clark* v. *Moses*, Kelly, 143; *Halton* v. *Button*, 4 Conn. 436; *Wiemer* v. *Shelton*, 7 Missouri, 237; *Hancock et al.* v. *Hodgson*, 3 Scam. 329; *Livingston* v. *Indianapolis Ins. Co.*, 6 Blackf. 133; 1 Wheat. Selwyn, 563; 10 Bacon's Abrg. 299.

3. The plea must show either that the money was a loan, or that an excess of interest was agreed to be paid, for the forbearance of a pre-existing debt, and for giving day of payment. *Hancock et al.* v. *Hodgson*, 3 Scam. 329, 301; 1 Wheat. Selwyn, 565; Bacon's Abrg. 299, 301.

4. The said answer must allege a tender of the money actually due, and bring the same into court. Story on Cont. 635; *Fanning* v. *Dunham*, 5 Johns. Ch. 122.

These are well settled principles, and tried by these, the

answer is utterly deficient. The answer alleges, after admitting the execution of the notes, and denying that they are indebted for interest, "that the notes executed by them as aforesaid, and each of them, are and is, usurious, *because* the sum of two and a half per cent. a month, stated in said notes, and which it is alleged, these defendants promised to pay as a penalty for default for non-payment for any and all of said notes when due, was, at the time of making said notes, agreed upon by the parties to this cause, as the rate of interest which said notes should draw after the same should become due, and was then agreed to be the rate of interest to be paid by the defendants to the plaintiffs, on the several sums of money named in said notes, after the same became due and payable, as the consideration for giving said notes," and "that there was no further or different consideration agreed upon between said parties, than an indebtedness to the amount of principal stated in said notes, at the time of the execution of said notes by defendants, or for the consideration for the ten per cent. interest, and the interest of two and one-half per cent. per month, named as a penalty, and which was intended and agreed upon as interest after said notes became due."

Now, in the first place, it will be admitted, that the *meaning* of this plea or answer, is difficult to arrive at; and, secondly, that it neither states that the agreement was corruptly made; nor that there was an agreement to pay and receive illegal interest; nor the principal sum loaned, and the amount of interest included in said notes, or the rate over and above legal interest, the defendants agreed to pay; nor that they agreed so to pay, in consideration that plaintiffs would and did extend the day of payment, is equally clear. In all these requisites of such plea, it is totally deficient. There is, however, one admission in the answer, which is important, yielding, as we conceive, the defendants' whole case; and that is this, that *there was no further or different consideration agreed upon between the said parties, than an indebtedness to the amount of the principal stated in said notes, at the time of their execution.* Here the defendants admit, that on the day when the said notes were executed, they owed the plaintiffs

the amount stated in said notes, and that such indebtedness was the only consideration for their execution. There is, then, no usurious consideration in said notes; and if they *are usurious*, they must either be so *on their face*, or there must have been an agreement that the plaintiffs would not enforce payment when said notes became due, but in consideration of the two and a half per cent. per month, named as a penalty, *would allow the said notes to run beyond the day of payment, or to a day agreed upon.* An allegation of this character, in addition to the other requisites above pointed out, and perhaps without them, would show an unlawful and corrupt agreement, and the answer or plea would be good.

Now, a plea of usury is in the nature of a penal action, and much strictness is required in pleading it. The plea should clearly show that the defence comes within the statute. 10 Bacon's Abrig. 301.

The question then arises, are the notes usurious *on their face?* and if so, have the defendants properly taken advantage of it? If the notes are usurious on their face, the petition is demurrable, and the defendants, instead of answering, should have demurred, and thus raised the question to the court. *Matlock* v. *Mallory*, 19 Ala. 694, cited in 13 U. S. Dig. 638.

But waiving this, the notes are *not* usurious on their face. They come within the principle laid down in *Wright* v. *Shuck*, Morris, 425. The notes only bear ten per cent. interest, the legal rate. If the defendants had complied with their contract, they would not be liable to pay anything more. There was no power in the plaintiffs to exact more than the law permitted them to exact. But for the purpose of assuring the plaintiffs that they might rely upon receiving their money when due, the defendants promised to pay a specified penalty; that penalty is nothing but liquidated damages. There is nothing in the contract which enables the plaintiffs to *defer* the day of payment, and thus acquire a right to the penalty. If the defendants paid the money when due, no penalty was to be paid at all. They alone have failed to perform their contract; they alone are in default; and in the language

of MASON, C. J., in *Wright* v. *Shuck*, above cited, "it would be contrary to all reason and justice, to allow him (them) to violate his (their) agreement, by not paying at the time, and then set up a consequence of his own breach of the contract, as a protection against all liability thereon." And it is well settled, that an agreement to pay even double the sum borrowed, *or other penalty* on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower wholly to discharge himself, by repaying the principal, according to the bargain. 10 Bacon's Abrig. 268, and authorities cited. The case at bar, comes fully within this doctrine, and further argument would seem to be superfluous.

In their argument, however, the appellants insist, that the demurrer admits the answer to be true, and hence they reason, that as the answer alleges the notes to be *usurious*, the demurrer admits the fact, that the notes are usurious. To this it seems hardly necessary to reply, that a demurrer only admits that to be true, which is *well pleaded;* that the mere allegation of usury, unsustained *by facts*, does not constitute a plea of usury; and that if the plea is deficient in any one respect, it is insufficient, and there is no admission upon the record.

The plea of usury being bad, for want of proper averments of fact, showing the usury, and the notes not being usurious on their face, the court properly sustained the demurrer, and rendered judgment for the amount due on the notes.

STOCKTON, J.—The first question arising in this cause, is as to the correctness of the decision of the District Court, in sustaining the demurrer to defendants' answer.

The answer is certainly most inartifically drawn. It is clearly insufficient in the facts it sets forth, to show that there was anything usurious in the contract between the parties, whereby defendants agreed to pay the several sums of money when the promissory notes respectively fell due. If the contract was usurious, the plaintiffs, under section 5, Act of February, 1853 (Session Acts, p. 68), would only have been

entitled to judgment for the principal sum loaned, without interest or costs. The contract itself is not rendered void. The object of the defendants, then, should have been to have stated such facts as would have shown the contract usurious, in order to avoid the payment of the interest and costs. But there are no facts alleged, to show that there had been any substantial payment, or agreement to pay, more than the law allows, either for the use of money lent, or for the forbearance of money due and payable. The agreement to pay the penalty of two and a half *per centum per month*, in default of payment of the principal sum and interest when due, formed no part of the consideration of the several promissory notes, or either of them, and consequently does not affect them with the taint of usury. The agreement was in its language and terms, a penalty to secure the faithful performance of the original contract. If this contract had been performed by the defendants, and the money paid according to the tenor and effect of their undertaking, at the time the promissory notes fell due, there would clearly have been no usurious interest paid or received. The defendants then had it in their power to obviate the objectionable feature of the contract of which they complain, and by their own act, free the promissory notes of the supposed taint of usury, to which they now object. Where a party agrees to pay a sum of money by a day certain, and more than legal interest afterwards, by way of penalty, if the debt be not punctually paid, such agreement is not usurious. The authorities to support this point are numerous, and we refer to the following, among others: *Wright* v. *Shuck*, Morris, 425; *Shuck* v. *Wright*, 1 G. Greene, 128; *Lawrence* v. *Cowles*, 13 Ill. 577; *Wells* v. *Girling*, 1 Broderip & Bingham, 447; *Brockway* v. *Clark*, 6 Hammond, 45; *Cutler* v. *How*, 8 Mass. 257; *Gambriel* v. *Doe*, 8 Blackford, 140; Kelly on Usury, 76; Parsons on Mercantile Law, 256; 2 Parsons on Contracts, 293. This contract, therefore, not being in our opinion usurious, the demurrer to defendants' answer was properly sustained by the court.

It appears from the record, that in the further progress of the cause, after sustaining the demurrer to so much of the

defendants' answer as was intended to set up the defence of usury, the court rendered judgment for the plaintiff for $3,427.40, being for the amount of the notes and interest to maturity, together with the penalty of two and a half *per centum per* month. It is now assigned for error, by the defendants, that this judgment is for too great a sum; that the plaintiff was entitled to judgment for the amount of the notes and interest only; and that the court should not have included in the judgment the penalty of two and a half *per centum per month.*

The defendants' agreement to pay the two and a half *per centum per month*, as a penalty in default of payment of the promissory notes at their maturity, is not essentially different from an agreement to pay a gross sum as such penalty. Nor do we perceive that either of the notes sued on, is essentially different from a penal bond, by which the obligor binds himself to pay the obligee a certain sum, with a condition appended, by which the first obligation is to be void on the payment of the lesser sum to the obligee, by a day certain. The real nature and essence of the agreement, is always disclosed by the condition of the bond or undertaking.

In the present case, the condition of the contract was to pay the notes with interest, by a certain day. If not paid punctually when due, defendants' promise to pay as a penalty for the default, two and a half *per centum per month* from maturity until paid. Are the plaintiffs entitled to enforce this penalty against the defendants, on their failure to pay the notes at their maturity? We may first remark, however, that on examination of the petition, we find that it does not set forth any breaches on the part of defendants, as on a penal bond. It does not aver what amount is claimed by plaintiffs, as due from defendants; nor does it pray judgment for the amount of the penalty. We refer to this, in connection with the question made by defendants in their assignment of errors, viz: whether the court should have rendered judgment for the penalty of two and a half *per centum per month*, and if not, for what amount should judgment have been rendered?

The consideration of this question, renders it advisable to inquire to some extent into the nature and history of actions for penalties, and on penal obligations. In an action of debt on a penal bond for condition broken, the amount which the plaintiff was entitled to recover, was originally the penalty. The action could not be relieved against either, by payment or tender. This severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed and would not allow the creditor to take more than in conscience he ought. Sedgwick on the Measure of Damages, 393. From the time that it became settled in equity, that the condition of the bond was the agreement of the parties, the obligor was relieved from the penalty. Very soon arose the practice, enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and the jury on the trial assessed such damages for the breaches assigned, as the plaintiff on the trial might prove. And it is enacted by the Code of Iowa, section 1818, that, "in actions on penal bonds, the petition must set forth the breaches, and the judgment rendered thereon, must be for the actual damages only." It may, therefore, be laid down as a settled rule, that no other sum can now be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. Such damages, it is further held, are not necessarily nominal, and the jury may give substantial damages, if they see fit. Sedgwick on Damages, 396, 397.

In the case of a loan of money, although in point of fact, a creditor may suffer the most serious inconvenience for the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal and interest may be a very inadequate compensation for the original disappointment, it may be stated as a general rule, that a promise of paying a penalty beyond the amount of legal interest, cannot be enforced. 2 Pothier on Obligations, Appendix, 87. Where the penalty has been incurred, the ends of justice may

be arrived at, by reducing the penalty to the actual debt. 2 Parsons on Contracts, 393. The case of *Groves* v. *Groves*, 1 Washington, 1, was an agreement for the payment of a debt at a certain day, and if not paid punctually, then for the payment of a larger sum; the court held that a contract to pay a larger sum at a future day, was not usurious, and that the increased sum should be considered as a penalty, against which equity ought to relieve, on compensation being made. So in *Brockway* v. *Clark*, 6 Hammond, 45, the Supreme Court of Ohio held, that where a money lender takes from a borrower, an obligation for a greater amount than the money lent, and stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation, if punctually paid, equity may relieve against the excess as a penalty, on the same principle upon which parties are ordinarily relieved from penalties. The same was granted at law in Massachusetts, in the case of *Cutler* v. *Howe*, 8 Mass. 257. After a verdict by the jury for the plaintiff, assessing the damages, the court directed a certain amount of the penalty, which it deemed oppressive, to be deducted from the amount ascertained by the verdict, and judgment was entered on the verdict as amended. In *Shuck* v. *Wright*, 1 G. Greene, 128, the note was for the sum of $300, payable two years after date, and to bear interest after maturity, if not paid, at the rate of fifty per centum per annum. Suit being brought by the holder of the note to foreclose a mortgage, given to secure its payment, the petition prayed judgment for the amount of the note, with such interest as the court should deem just and proper. Judgment was given for the plaintiff, for the amount of the note and interest at *six per centum per annum*. This judgment was affirmed by the Supreme Court (1 G. Greene, 128), and we may consider that the principle was thereby settled, so far as the authority of this court could settle it, that the plaintiff was not entitled to judgment for the penalty of fifty *per centum per annum*, but for six per cent. only.

In another class of cases, where the parties have agreed upon a sum certain as the measure of damages, in order as

far as possible to avoid all future questions as to the amount of damages, which may result from the violation of the contract; and where a definite sum was named, as settled and liquidated, if the construction of the phraseology would work oppression, the use of the term, "liquidated damages," did not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. 'No damages for the mere non-payment of money, can ever be so liquidated between the parties, as to evade the provisions of the law, which fix the rate of interest.' Sedgwick on the Measure of Damages, 400. In *Orr* v. *Churchill*, 1 H. Blackstone, 232, Lord LOUGHBOROUGH said: "There can only be an agreement for liquidated damages, where there is an agreement for the *performance of certain acts*, the not doing of which would be injurious to one of the parties; or to guard against the performance of acts, which if done, would also be injurious. But in cases like the present, the law having fixed by positive rules, the rate of interest, has bounded the measure of damages." In the case of *Gray* v. *Crowley*, 18 Johnson, 226, where a party covenanted on a certain contingency, to pay to another, a sum of money, with a proviso, that if he failed or refused, then he would pay a larger sum as liquidated damages, the Supreme Court of New York, say, "such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a secure protection for usury, and countenance oppression under the forms of law."

On a consideration of these authorities, we have no hesitation in coming to the conclusion, that the District Court erred in rendering judgment against defendants for the penalty of two and a half *per centum per month*, stipulated in the notes. The plaintiff was entitled to recover only the several sums agreed to be paid, with the interest at the rate of ten *per centum per annum*, and the cause being heard on the petition and exhibits only, the judgment should have been for the money actually due, without the addition of the penalty.

The judgment having been rendered, without any objection made to it in the District Court, and without any effort there to correct or reduce the amount of the damages, we have inquired whether the defendants can now ask to have the same corrected in this court, and assign for error that the judgment was for too great a sum. The questions made by defendants, however, we think, arose properly in this case, and the errors are well assigned. Even when the judgment below has been by default, this court will correct any errors apparent on the face of the proceedings, as when the judgment is for more than is claimed by plaintiff, or where, as in this case, it is for more than he is rightfully entitled to recover. *Roberts* v. *Smith, &c.*, Morris, 417; *Doolittle* v. *Shelton*, 1 G. Greene, 27. The judgment of the District Court will therefore be reversed.

Judgment reversed.

Howes *v.* Carver.

An instruction which assumes that to be true, of which there is no proof, is erroneous.

Under section six of the act of 1852, in relation to estrays, the taker up of an estray, is confined to his plantation, or place of residence, and his authority to take up straying animals, does not extend to the entire township in which he resides.

Nor is such right necessarily confined to the township. Ordinarily, he would be so confined; but should his farm or plantation be situated in different townships, he might take up in either, but not at any other place than at such plantation or farm.

The law of 1852, in relation to estrays, changes section 884 of the Code, so far as to confine the taker up, to his farm or plantation, and may, or may not, extend this right beyond the township in which he resides, depending upon the location or boundary of such plantation.

The words "or otherwise as the case may be," in section six of the act of 1852, have reference to the taking up, provided for by the eighth section of the same act, and contemplate a taking up *without*, and not within, the settlements.

The sole object of the certificate required by section twelve of the act of 1852, is to advise the owner of the property when examining the estray books, of

the loss or accident; and when the owner has knowledge of the loss on the same day it occurs, there is no reason in requiring the certificate to be sent to the clerk.

Appeal from the Alamakee District Court.

THE plaintiff sues for the value of a mare, which he alleges came into the possession of defendant by finding, and escaped by reason of his negligence. The answer denies all the material allegations of the petition. From the testimony (all of which is before us by proper bill of exceptions), it appears that the mare was a work beast, and strayed from plaintiff on the first of May, 1855, and on the next day was stopped by one Evans, at his residence about twenty miles distant, and about half a mile from defendant's. She had a halter on, and with this Evans fastened her to his fence. Defendant came along shortly after; they talked about the mare, and both thought they knew to whom she belonged. Evans had no stable, and at his request, defendant took the mare with him to his residence, and put her up. On the next day, defendant rode her a short distance, and on his return, put her in his stable, fed her, and fastened the door with its usual fastening. On the next morning, the door was open, the halter broken, and the mare gone. Defendant and another person started in search, and on that day, met the plaintiff coming for her, he having heard that defendant had taken her up. Defendant told him all the circumstances, and plaintiff required him to deliver the mare, or pay her value. This was refused, and the mare not being found, plaintiff brought this suit to recover her value.

On the trial, the court instructed the jury in substance as follows: The defendant must prove that he took up the mare in the civil township in which he resides; and if he did not do so, he had no right to take her up; and having done so, is liable for her value; and further, that if the mare escaped without the fault or neglect of the defendant, and he was faithful in taking care of her, he is not liable; but in order to avail himself of this defence, he must prove by the estray book of the county, that he gave notice, under his hand and

seal, to the clerk of the county judge, of such escape. Other instructions were given, but as they are not material in the decision of the case, we omit them. To the above instructions, the defendant excepted. Verdict for the plaintiff, and the usual motions in arrest and for a new trial, were made and overruled. The defendant appeals, and assigns for error these rulings of the court.

W. T. Barker, for the appellant.

W. M. Tripp, for the appellee.

WRIGHT, C. J.—Defendant seeks to reverse this case, *First*, because the instructions were erroneous; and *Second*, because the verdict was manifestly against the evidence. As we conclude that the first ground was well taken, we need not determine the second.

The first instruction is erroneous, inasmuch as it assumes that to be true, of which there is no proof. The jury are told that the defendant "having taken the mare up out of the proper township, he is liable." No testimony appears to have been given either way on this subject. And, again, if there had been, it was a question of fact for the jury, and not of law for the court.

But the more important point in this instruction is, whether any person has a legal right within the settlements, to take up an estray animal, *out* of the civil township in which he resides? And this question has been argued by counsel, as if it was material to inquire whether chapter 51 of the Code, and especially section 884, has been repealed by chapter 104 of the laws of 1852–3. Without determining this question, however, in the form presented, we proceed to state the views entertained by us of this part of the instruction. Under the statute of 1852–3, in force when this mare was taken up, the taker up is confined to his plantation or place of residence, and his authority or right to take up straying animals, does not extend to the entire township in which he resides. Nor is such right necessarily con-

fined to the township. Ordinarily, it is true, he would be so confined; but should his farm or plantation be situated in different townships, he might take up in either, but not at any other place than at such plantation or farm. If, therefore, in this case, the defendant's farm was confined to one township, he could not reasonably complain of this instruction, for it recognizes his right to take up in any place within such township, and does not confine him to his farm or plantation. If, on the other hand, his farm shall be part in one township and part in another, the instruction is erroneous, as far as it confines his right to take up, to the civil township in which he resides. In such a case, he would have the right to take up, in either township, if taken up at such plantation or farm. In short, as we understand the law of 1852–3, it changes section 884 of the Code, so far as to confine the taker up to his farm or plantation; and may or may not extend this right beyond the township in which he resides, depending upon the location or boundary of such plantation.

It is said, however, that section 6, provides that the taker up must make oath that the property was taken at his or her plantation, or place of residence in said county, "*or otherwise as the case may be*," and that the words "or otherwise, as the case may be," would seem to contemplate a taking up at some other place than the residence or plantation of the finder. We think these words have reference to the taking up provided for in section 8 of the same act. By that section, any householder finding an estray horse, &c., running at large, *without any of the settlements of the state*, may take the same up. He is then required to take the same forthwith before the nearest justice of the peace, and make oath as required in section six. But this reference to section six, relates to the marks and brands, and cannot, from the very nature of things, to the fact that the taking was at his residence or plantation. So that the words "or otherwise, as the case may be," contemplate a taking up without, and not within the settlement. This construction gives force and meaning to all of the provisions of the law on this subject,

and any other leaves them either conflicting or unmeaning.

We next consider the second instruction. Our law provides that if the taker up of any estray animal, shall be faithful in taking care of the same, and any unavoidable accident shall happen thereto, without his fault or neglect, he shall not be accountable therefor; *provided*, that in all such cases, it shall be his duty within ten days thereafter, to certify the same to the clerk of the county judge, who shall make an entry thereof in his estray book. Section 12, chapter 104, laws of 1852–3. It has been assumed in the argument, that the escape of an animal is, or may be, an unavoidable accident, within the meaning of this section. The only question then is, whether after such escape, defendant would be liable if he failed to give the notice contemplated. Under the circumstances of this case, we clearly think not. The primary, and so far as we can see, the sole object of this certificate or notice, is to advise the owner of the property, when examining the estray books, of such loss or accident. He alone can claim to be injured by such failure. And when, as the proof here shows, he had knowledge of the loss on the same day it occurred, there is no reason in requiring this certificate to be sent to the clerk. So far as the parties are concerned, the object of the law is thus fully accomplished, and more than this is not required by either its reason or spirit.

Judgment reversed.

Griffin *v.* Moss.

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Whenever final judgment is rendered before a justice of the peace, a party may appeal; and the right of appeal is allowed him, whether the judgment complained of, is one of law or of fact.

Where an action was commenced before a justice of the peace, by attachment, and the entry in the docket of the justice read as follows: "Parties appeared, January 8th, 1855. Trial had before G. W. Buttles, justice of the peace. On examination, it was found that the defendant had not legal notice, and that the

attachment was not legally served. Therefore, judgment was rendered against plaintiff for fifty dollars and fifty-five cents damages, and costs of suit," from which judgment the plaintiff appealed to the District Court; and where the defendant moved in the District Court to dismiss the appeal, for the following reasons: "1. No question of fact was presented to the court below for decision, nor was any question of fact decided in that court; therefore, an appeal will not lie. 2. To correct any error in law, or irregularity in the justice's court, it can only be brought into the District Court by writ of error;" which motion was sustained by the court, and the appeal dismissed; *Held*, That the plaintiff was entitled to have the cause reheard on its merits in the District Court; and that for this purpose, an appeal was the regular and proper mode of obtaining relief.

Appeal from the Alamakee District Court.

THIS action was brought before a justice of the peace by attachment, to recover the sum of $12.70. The entry made by the justice in his docket, is as follows: "Parties appeared, January 8th, 1855. Trial had before G. W. Buttles, justice of the peace. On examination it was found, that the defendant had not legal notice, and that the attachment was not egally served. Therefore, judgment was rendered against plaintiff for fifty dollars and fifty-five cents, damages, and costs of suit." From this judgment, plaintiff appealed to the District Court. The defendant moved to dismiss the appeal, for the following reasons: 1. No question of fact was presented to the court below, for decision, nor was any question of fact decided in the said court below; therefore, an appeal will not lie. 2. To correct any error in law, or irregularity in the justice's court below, it can only be brought into the District Court by writ of error. The District Court sustained the motion, and dismissed the appeal. To which plaintiff excepted, and appeals to this court.

W. M. Tripp, for the appellant.

W. T. Barker, for the appellee.

STOCKTON, J.—The Code of Iowa (§ 2328) gives the aggrieved party an appeal from all final judgments of a justice of the peace. The judgment in the present cause, has

all the essential requisites of a final judgment. The plaintiff was entitled to have the case reheard *on the merits*, in the District Court, and for this purpose, an appeal was the regular and proper mode of obtaining relief.

Where no question of fact is involved, and the testimony of witnesses is not needed, the party aggrieved by an erroneous decision of the justice, on a matter of law, or by other illegality in the proceedings, may bring the question of law for revision before the District Court, by writ of error. Code, § 2349. But there is no power in the District Court, to control the party in the choice of his remedy. Whenever final judgment is recovered, he may appeal; and the right of appeal is allowed him, whether the judgment complained of, if final, is one of law or fact.

In the present case, we put entirely out of sight, whether the decision of the justice was right or wrong; whether any question of fact was decided or not; and whether the plaintiff might not have had a complete remedy by writ of error. We look only at the question, whether the judgment was final? and being satisfied that it was final, we think that the judgment of the District Court in dismissing the appeal was erroneous, and ought to be reversed.

Judgment reversed.

PARKER *v.* HENDRIE.

To justify the granting of a new trial, on the ground that the verdict is against the weight of evidence, such want of evidence must relate to a material issue, legitimately made by the pleadings.

It is the issue of fact *made by the pleadings*, which the jury are to determine, and not other or different ones.

Where in an action to recover damages for an alleged breach of warranty in the sale of a thrashing machine, the defendant answered, admitting the contract of sale, but denying that the machine was defective in the particulars alleged, and averring that it was broken by the negligence of the plaintiff; to which there was a replication in denial; and where the bill of exceptions

stated that the defendant introduced no evidence to prove that the machine was broken by the negligence of the plaintiff, but it appeared from the record, that some testimony was introduced to show, that at the time the machine was repaired, the defendant notified the plaintiff, that if it did not work well, it must be returned immediately; that it did fail to work well; and that after keeping the machine some four weeks, the plaintiff returned it in a broken condition to defendant, who refused to receive it; and where the defendant obtained certain instructions, as to the duty of the plaintiff to return the machine, under the contract which he claimed was made at the time of repairing it; and where the jury returned a verdict for the plaintiff, and thereupon the defendant moved for a new trial, on the ground that the verdict was against the law and evidence, which motion was overruled; *Held*, That the testimony as to the agreement to return the machine, and the instructions based thereon, related to an issue not made, or attempted to be made, in the pleadings; and the evidence was, therefore, immaterial.

Appeal from the Des Moines District Court.

THE plaintiff seeks to recover damages for an alleged breach of warranty, in the sale of a threshing machine. Defendant answers, admitting the contract of sale, but denies, however, that the machine was defective, in the particulars alleged in the petition; and avers that it was broken by plaintiff's own negligence; that defendant at one time repaired it, and plaintiff again broke it, by like negligence, and improper usage. To this, there was a replication in denial. The bill of exceptions states, that defendant introduced no evidence to prove that the machine was broken by reason of plaintiff's negligence. It does appear, however, that some testimony was introduced to show, that at the time the machine was repaired, defendant notified plaintiff, that if it did not work well, it must be returned immediately; that it did fail to work well; and that after keeping the machine some four weeks, plaintiff returned it in a broken condition to defendant, who refused to receive it. Defendant then asked several instructions, as to the duty of the plaintiff to return the machine, under the contract which he claimed was made at the time of repairing it. These instructions were given as asked, and the jury returned a verdict for plaintiff. The defendant then moved for a new trial, on the ground that the verdict was against the law and evidence, which motion

was overruled. Defendant appeals, and assigns for error, the decision of the court in overruling the motion for a new trial.

Starr & Phelps, for the appellant.

Browning & Tracy, for the appellee.

WRIGHT, C. J.—Appellant insists, that this verdict was so clearly against the weight of evidence, that it should have been set aside, and a new trial ordered. The issue made in the case, to state it briefly, was, whether the machine failed to work well, because of plaintiff's negligence. Upon this subject, the bill of exceptions informs us, that the defendant failed to introduce any proof. As the burthen of proof in this respect was upon him, there is no ground for claiming that the verdict was against evidence. The testimony as to the agreement to return the machine, and the instructions based thereon, relate to an issue not made, or attempted to be made, by the pleadings. The testimony was, therefore, immaterial. To justify the granting of a new trial, on the ground that the verdict is against the weight of evidence, such want of evidence must relate to a material issue, legitimately made by the pleadings. It is the issue of fact *made by the pleadings*, which the jury are to determine, and not others or different ones.

Judgment affirmed.

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LONG *v.* SMYSER & HAWTHORNE.

The assignee of a promissory note not negotiable, may sue the assignor, without first demanding payment of the maker, and without notice of the non-payment to the assignor.

The holder of a promissory note not negotiable, indorsed in blank, may fill up the indorsement, by writing over the name of the indorser, a waiver of demand and notice.

Appeal from the Mahaska District Court.

THE defendant, Hawthorne, made his promissory note to his co-defendant, Smyser, for $300, which Smyser, before the same fell due, assigned to the plaintiff. The note was payable in current funds, and was not negotiable. Payment not being made by Hawthorne, when the note fell due, Long brought suit against the maker and indorser. Judgment by default, was rendered against Hawthorne. Smyser demurred to the petition, for various reasons set forth in the demurrer, and among others, that the petition does not show that payment had ever been demanded by plaintiff of the maker of the note, and that Smyser had never been notified of the non-payment. The court sustained the demurrer, to which plaintiff excepts, and assigns the sustaining of the demurrer as error.

W. H. & J. A. Seevers, for the appellant.

The only case in point to be found in Johnson and Wendell, is *Seymour* v. *Van Slyck*, 8 Wend. 403, which is just like this. The note being not negotiable, and being indorsed by the payee, the latter was held liable without proof of demand on the maker, or notice of non-payment to the indorser; for the reason given in 8 Pick. 423, that there is no such thing as an indorser of a note not negotiable; at least, he is not entitled to the rights of indorsers of negotiable paper, as to demand and notice. The rule in Connecticut is, that where the payee of a note not negotiable, signs his name in blank

on the back of the note, he is responsible, without proof of demand and notice. His liability is a conditional one to a certain extent only, that the holder should use due diligence by the commencement of a suit, to make the money of the maker. 5 Conn. 175; 11 Ib. 213, 440; 16 Ib. 223, and 4; Ib. 389. The payee of a note not negotiable, indorsed in blank, was held liable as original promissor or surety, (3 Mass. 274), which is the only case to be found like this; all others cited, being negotiable notes and the indorser not being a payee thereof. Such is also the result of our examination of the New York authorities.

The case cited by Story, in support of the *dictum*, that an indorser of a note not negotiable, is entitled to notice of non-payment by the maker (Story P. Notes, § 128), is *Jocelyn* v. *Ames*, 3 Mass. 274. This case does not sustain him, but is to the contrary effect. *Jones* v. *Falls*, 4 Mass. 245, is, perhaps, not in point. A minority of the court held that the note was negotiable, and the whole court held, that there was sufficient proof of notice; and the remark by PARSONS, "that indorsers were not liable, without proof of demand and notice," was not called for by the case, being a mere *obiter dictum*. In *Sanger* v. *Stimpson*, 8 Mass. 259, no question was made as to the negotiability of the note; besides which, a notice was proved, which was held sufficient. No question was made by counsel, or decided by the court, as to whether the indorser was entitled to notice. *Upham* v. *Price*, 12 Mass. 14, was a negotiable note, besides which the indorsement was special, and held by the court to be a guaranty, and indorser not entitled to notice. *Jones* v. *Witter*, 13 Mass. 304, is entirely different. The note was negotiable. The suit was against the maker, and not against the indorser. The only point made or decided was, whether the maker was entitled to credit for money paid the payee, after notice of the transfer? The other cases cited by Mr. Story, are not within our reach. Where there are conflicting decisions by courts of equal respectability, this court will adopt such rule as is best suited to our people. And what has been the common understanding of the courts, bar, and people, as to the

true construction of the contract of indorsement of notes not negotiable? In arriving at this understanding, no better guide can be followed than our statutes upon the question. As early as January, 1839, an act was passed upon this subject, by which a complete and radical change in the law merchant was made; and in reference to the question under consideration, the indorser of all notes, whether negotiable or not, was held liable, if due diligence by suit against the maker, had been used, and was unavailing. The indorser was not entitled to demand and notice. Laws of 1839, 382, § 2. And such substantially, has been the law in this territory and state, up to the passage of the Code. Laws of 1843. Nor has the Code made any material change in the law upon this subject. Sections 954, 955, 956. For a period of years, then, the law has been codified and well understood; parties have acted upon it; and it was reserved to the legislature of 1853, to make what was well known and understood by all, uncertain, and throw us back upon the doubts and conflicting decisions of the law merchant. Laws of 1853, 128, § 3. At least, this was attempted, and it is for this court to say, to what extent it has been done—whether the act of 1853, only applies to instruments recognized as negotiable by the law merchant only, or such as are made negotiable by the Code?

1. We claim, that the provisions of the Code are not repealed as to instruments not negotiable. The class of instruments mentioned in section 949 of the Code, are affected equally with all others. A class unknown to the law merchant. The Code makes them assignable. The law of 1853, does not change that provision, but if it applies to them at all, compels the assignee to give notice of non-payment, before he can recover of the assignor. How can it be said "that notice of the non-payment of such instruments, shall be given according to the rules of the commercial law," when such instruments were unknown to the commercial law? What is to be done with the class named in sections 950, 951? The law of 1853, cannot apply to them; if not, why does it to the class under consideration? When you once say it ap-

plies to notes not negotiable, there is no reason for stopping short of all notes and instruments made negotiable by the Code.

2. We insist that the reference in the law of 1853, to the "commercial law," must be taken to mean the "commercial law" of Iowa. The term "commercial law," is peculiar to statute, and is to a great extent unknown out of it. At least, it has no clear *legal* meaning or signification. If the intention was to refer to the "law merchant," why did they not say so. And the meaning would have been clear and well understood. Every state in the Union has a "commercial law," peculiar to its own jurisdiction, and different in many particulars from each other. The "commercial law" is understood differently. The "law merchant," when used, has a technical and legal meaning; "commercial law," has not. If the "commercial law" of Iowa, is what is referred to, then all is clear, and can be well understood. It consists not of contradictory decisions of courts, either of our own or other states, but of statutes, that are plain and easily understood by all. If this construction is adopted, the Code and the law of 1853, can both stand, which construction should be given if possible, at least, as to those portions of the Code which are only inferentially repealed by the act of 1853.

3. We understand that the Code provides (so far as paper negotiable by the law merchant, or made so by the statute of Anne, which has been held merely declaratory of what that law was), that grace is allowed on bills of exchange, but that a demand on any of those days will be sufficient to charge the indorser; and that the latter is liable, if due diligence has been used by commencement of suit against the maker, upon negotiable instruments. Sections 955, 957. By the law of 1853, grace is allowed upon both bills and notes. According to the rules of the "commercial law," if the latter is held to be identical with "law merchant," then we claim that all the law of 1853, affects in the least, are instruments negotiable according to the principles of the law merchant; or in other words, the class of instruments contemplated in sections 947, 955, 957; and that the instruments

mentioned in all other sections of the Code, are unaffected by its provisions, and that all other sections of the Code stand. If the law of 1853, by the words "commercial law," refers to the "law merchant," it is not the peculiar "law merchant, of Massachusetts, where a note not payable to "order or bearer," is held to be negotiable. The reverse is held in New York, while in Connecticut, a different rule still prevails. But it refers to the law merchant of England, from whence all our law upon this subject was derived. By it, the note under consideration is not negotiable.

It will be seen that the amended petition, claims the right to write over a blank indorsement of a promissory note, *anything* that will make the indorser liable, without proof of demand and notice.* Upon this question, 3 Mass. 274, and 8 Pick. 423, are relied on. In those cases, such a doctrine was announced.

Loughridge & Macon, for the appellee.

STOCKTON, J.—Various questions are raised by the demurrer to the amended petition in this cause. The most important question, however, to be decided, is as to the right of the assignee of a promissory note not negotiable, to sue the assignor, without first demanding payment of the maker, and without notice of the non-payment to the assignor. The same question has been before this court, at the present term, in the case of *Wilson* v. *Ralph & Van Shaick*, from Linn county. We have felt inclined to follow the authority laid down in the case of *Seymour* v. *Van Slyck*, 8 Wendell, 421, in which the Supreme Court of the state of New York held, that the indorsement of a non-negotiable note, is equivalent to the making of a new note, and is a direct and positive undertaking on the part of the indorsers, to pay the note to the indorsee, and not a conditional one to pay, if the maker does not upon demand, after due notice.

Another question raised by the plaintiff in his assignment of errors, is, as to the right of the holder of a promissory note not negotiable, indorsed in blank, to write over the blank

indorsement, a waiver of demand and notice, or anything else which may render the indorsers liable, without proof of demand and notice. As such a filling up of the blank indorsement, would only be expressing in writing, what is in reality the meaning and effect of the undertaking of the indorsers, and as defendant would not be in any manner prejudiced by such an act, we are inclined to decide in conformity with the adjudications in Massachusetts and New York, that the holders of a non-negotiable note, indorsed in blank, is entitled to fill up the indorsement, by writing over it a promise to pay the contents of the note to the indorsee, or a waiver of a demand and notice. See *Jocelyn* v. *Ames*, 3 Mass. 274; *Oxford Bank* v. *Haynes*, 8 Pickering, 423; *Herrick* v. *Carman*, 12 Johnson, 161; *Seymour* v. *Van Slyck*, 8 Wend. 421. We are, therefore, of opinion, that the plaintiff was entitled to recover on his amended petition, and that the demurrer to the same was improperly sustained.

Judgment reversed.

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SAVARY *v.* SAVARY.

Where suit was brought upon a promissory note, dated at Batavia, May 28th, 1851, payable to one S. or bearer, in three months from date, in which action the defendant pleaded as a set-off, a promissory note executed by the plaintiff, dated at Rome, April 24th, 1852, payable to a third person, in one day from date, of which he alleged he became the owner, "a short time after the said 24th of April, 1852, and whilst S. was still the owner of the note given by defendant;" and where on the trial, question was made as to the authority of the plaintiff's attorneys to bring the suit, which question was referred to the jury by the court; and where the court instructed the jury as follows: 1. That before they could find for the plaintiff in any event, they must be satisfied from the testimony, that the attorneys for the plaintiff had brought the suit by the authority and direction of the plaintiff. 2. That the *lex loci contractus*, or the law of New York, must govern as to the rights of the parties in relation to the set-off, and not the law of Iowa, where the suit is brought; *Held*, 1. That the court erred in giving the instructions; 2. That the plaintiff's right to recover, should not have been made dependent on the attorney's authority to sue.

The *lex loci contractus* governs as to the nature, validity and interpretation of the contract; but the *lex fori* governs in matters pertaining to the remedy. The law of set-off belongs to, and is a part of, the remedy.

Appeal from the Polk District Court.

THE plaintiff sued the defendant on his promissory note, for $159, given to one G. W. Savary, and payable to him or bearer, in three months from date, and dated at Batavia, May 28th, 1851. The defendant pleaded as a set-off, a promissory note of the said G. W. Savary, given to one James C. Savary, dated at Rome, April 24th, 1852, by which said G. W. promised to pay said J. C. $237, in one day from date, of which defendant alleges he became the owner, "a short time after" the said 24th of April, 1852, and whilst J. W. Savary was still the owner of the note given by defendant. On the trial, question was made as to the authority of the plaintiff's attorneys, to bring suit on the note in this action sued upon. The court referred this question to the jury, with the remainder of the case, on the issue joined. The other facts necessary to an understanding of the case, will appear in the opinion of the court.

Samuel A. Rice, for the appellant, made the following points:

1. The *lex loci contractus* governs as to the nature, validity and interpretation of contracts. *Bank of United States* v. *Donelly*, 8 Peters, 361; Story Con. Laws, § 558; Ib. 939, note 2; 1 Caines, 402.

2. The *lex fori* governs as to the remedy. 8 Peters, 371; *Wilcox et als.* v. *Hunt et als.*, 13 Peters, 379; *French* v. *Hall*, 9 N. H. 137; *Peck* v. *Hozier et al.*, 14 John. 346; 3 Gill & Johns. 234; 2 Mass. 87; *Whitman* v. *Adams*, 2 Cowen, 626; *Dixon's Ex'rs* v. *Ramsay's Ex'rs*, 3 Cranch, 323.

3. What is proper matter of set-off, must be determined by the *lex fori*, and not the *lex loci contractus*. *Gibbs et ux.* v. *Howard*, 2 N. H. 296; *Ruggles* v. *Keeler*, 3 John. 263; Pothier on Obligations, 641, 642; Story Con. Laws, 961.

4. The defendant had no interest in the question, and it

could not be matter of defence whether plaintiff's attorneys were authorized to commence suit or not. This question could only originate between plaintiff and his attorneys.

5. All the court could have done, in case it appeared that the attorney had no authority, would have been to stay the proceedings in behalf of the party for whom he assumes to appear; and it was a question for the court, and not for the jury. Code, § 1617.

Brown & Elwood, for the appellee.

WOODWARD, J.—The court below gave several instructions to the jury, which are resolvable into the following two: 1. That "before they could find for the plaintiff in any event, they must be satisfied from the testimony, that the attorneys for the plaintiff had brought suit by the authority and direction of the plaintiff. 2. That the *lex loci contractus*, or the law of New York, must govern as to the rights of the parties in relation to the set-off, and not the law of Iowa, where the suit is brought. It is presumed that there was evidence showing that the notes were made in New York. The plaintiff excepts to the above instructions. A verdict was rendered for the defendant. The plaintiff's right to recover on the note held by him, should not have been made dependent on the attorney's authority to sue. Such want of authority, would be ground only for dismissing the suit, at the most. Or, if the attorneys were not prepared to show their power, the defendant might have a continuance. Another view of the matter is, that this want of authority to bring the suit, was not a defence to the note, and was not pleaded as such; and therefore should not have been put to the jury, with the proper issue of the cause, notwithstanding any apparent tacit consent by counsel. Being so submitted to them, it forms an immaterial issue; and this being effected by the action of the court, and not of the counsel, a new trial should have been granted upon the motion made for that purpose. The *lex loci contractus* governs as to the nature, validity, and interpretation of a contract, but the *lex fori* governs in matters

pertaining to the remedy. And to this belongs the question of set-off. The rights in relation to this branch of the cause, were to be governed by the law of Iowa, and not by the law of New York. See the authorities cited by plaintiff's counsel. In these things, we are of the opinion, that the District Court erred, and therefore the judgment below is reversed, and a writ of *procedendo* will issue.

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ABRAMS *v.* FOSHEE AND WIFE.

To cause or procure an abortion, before the child is quick, is not a criminal offence at common law, whatever it may be after the child is quick.

An infant in *ventre sa mere*, is not a human being within the meaning of section 2508 of the Code.

To charge a woman with causing or procuring an abortion, is not to charge her with the crime of murder, under the law of Iowa.

Where there is no law punishing the act of causing or procuring an abortion, at the time of the speaking of the words, to charge a person with such an act, is not actionable, *per se*.

The appellate court will not allow a party to be prejudiced by the refusal of the court to give a correct instruction, because the same may possibly have been given in instructions which have been lost, without his fault.

Where in an action for slander, the alleged slanderous words were substantially as follows: "She is a bad woman; she has destroyed with instruments, children since she has been here; she has destroyed one or two children since she has been here; she takes medicine and kills her children; she destroys her children," which were alleged to have been spoken on the first day of January, 1855; and where on the trial, the defendant asked the court to instruct the jury as follows: "Words charging a woman with causing or producing an abortion, in this state, since the first day of July, 1851, are not in themselves actionable; that producing an abortion, before the child is quick, is not now a crime in Iowa, and has not been since July 1, 1851; and that charging a female with having produced an abortion, under such circumstances, is not actionable," which instructions the court refused to give; *Held*, That the instructions were improperly refused.

Appeal from the Davis District Court.

SLANDER. Verdict and judgment for plaintiff. The pe-

tition contains twelve counts, charging the slanderous words to have been spoken in various forms. The substance of the charging part of most of the counts, is as follows: "That the wife of defendant, on the first day of January, 1855, in speaking of the fact, that the wife of the plaintiff did not have children born alive, and of and concerning the subject of producing abortion and destroying children before birth, of which said plaintiff's wife had been pregnant, falsely and maliciously spoke, and published of the said Julia A., (wife of plaintiff,) these slanderous words, to wit: "she is a bad woman; she has destroyed with instruments, children since she has been here; she has destroyed one or two children since she has been here; she takes medicine and kills her children; she destroys her children." One count charges the defendant's wife with having said, "she (meaning plaintiff's wife) is not a decent woman; she has sexual intercourse with other men." No special damages are claimed; the petition was demurred to, for the reason that the words charged are not actionable *per se*, which demurrer was overruled. On the trial, the defendants asked the following, among other similar instructions:

Words, charging a woman with causing or producing an abortion, in this state, since the first day of July, 1851, are not in themselves actionable; that producing an abortion before the child is quick, is not now a crime in Iowa, and has not been since July 1, 1851; and that charging a female with having produced an abortion, under such circumstances, is not actionable; which instructions were refused. It appears from the certificate of the clerk, that the instructions in chief given to the jury, had never been returned by them, and what those instructions were, is in no manner shown. Defendants appeal.

Palmer & Trimble, for the appellants, cited the following authorities: *Onslow* v. *Wilson*, 3 Wilson, 177; *Chaddock* v. *Briggs*, 13 Mass. 248; *Blass* v. *Tobey*, 2 Pick. 320; *Harvey* v. *Boies*, 1 Penr. & W. 12; *Weierbach* v. *Trone*, 2 Watts & Serg. 408; *Williams* v. *Karnes*, 4 Humph. 9; *Elliott* v.

Ailesberry, 2 Bibb, 473; *Mills and wife* v. *Wimp*, 10 B. Monr.; *Billings* v. *King*, 7 Vermont, 489; *Shafer* v. *Kinster*, 1 Binney, 537; *Chapman* v. *Cook*, 2 Tyler; *Coburn* v. *Howard*, Minor, 93; *McEwen* v. *Ludlam*, 2 Harrison, 13; *Kinney* v. *Kasla*, 3 Harrington, 77; *Taylor* v. *Kneeland*, 1 Douglass, 68; *Giddons* v. *Meek*, 4 Geo. 364; *Dunnell* v. *Fisk*, 11 Metc. 551; *Tenney* v. *Clement*, 10 New Hamp. 32; *Heming* v. *Power*, 10 Mees. & Wels. 564; *Byron* v. *Elmes*, Salkeld, 693; *Brandt and wife* v. *Roberts and wife*, 4 Burrows, 2418; 2 Johns. 115; 6 Harr. & Johns. 248; 3 New Hamp. 194; 2 Nott & McCord, 204; 4 Stew. & Port. 387; 2 Bibb, 473.

C. C. Nourse, and *Knapp & Caldwell*, for the appellees, cited the following: Code, §§ 25, 68; Chitty's Med. Juris. 410; *Malone* v. *Stewart and wife*, 15 Ohio, 320; *Daily* v. *Reynolds*, Iowa Sup. Court, 1854.

WRIGHT, C. J.—But one question is presented for our consideration by appellants, and that is, whether words charging a woman with causing or producing an abortion, are actionable in this state?

The appellees claim, first, that as the instructions in chief, are not before us, we cannot say but that the instructions asked by appellants, were refused, because they had been previously given. The whole record rebuts any such presumption. The overruling of the demurrer, which raised substantially the same questions, clearly shows that on this point the court could not have instructed in chief, as requested by appellants. And then, again, these instructions are asked in so many different forms, and refused in all, that we can hardly suppose, that the same view had been taken in the previous instructions. But still further, we would be unwilling to allow a party to be prejudiced by the refusal of the court to give a correct instruction, because the same may possibly have been given in instructions which have been lost, without his fault.

It is next claimed by appellees, that one count charges the defendant's wife with having been guilty of adultery; that

the proof may have been confined to that count alone; and if so, the instructions asked, were properly refused, on the ground of their inapplicability. The whole record, however, so unmistakably shows that the words charging the abortion, were those relied upon for a recovery, that we should be doing violence to suppose the instructions were refused as being inapplicable; and especially so, as nothing of the kind is intimated by the judge trying the cause, when refusing such instructions. We conclude, therefore, that the question is fairly presented, whether the instructions asked were correct, and should have been given.

To maintain an action of slander, the consequence of the words spoken, must be to occasion some injury or loss to the plaintiff, either in *law* or *fact*. As the declaration in this case, claims no special damages, or a loss or injury, in *fact*, we are left to inquire whether the charge referred to in the instructions refused, was of such a character as to amount to an injury *in law*. To determine this, it becomes material to ascertain in what cases this action may be maintained, without proof of special damages. Starkie, in his work on Slander, page 9, lays down the rule, that such action may be maintained "when a person is charged with the commission of a *crime;* when an infectious disorder is imputed; and when the imputation affects the plaintiff in his office, profession, or business." In this case, we only need examine the rule so far as it relates to the charge of a crime. And what is that rule? In *Cox and wife* v. *Bunker and wife*, Morris, 269, the Supreme Court of this territory, recognized the rule laid down in *Miller* v. *Parish*, 8 Pickering, 385, as the proper one. And in that case it is said, that "whenever an offence is charged, which if proved, may subject the party to a *punishment*, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable. And this is, perhaps, as correct, and at the same time as brief a statement of the general rule, as has been given. For while the rule is variously stated, by different authors and judges, yet in all of them, it is laid down as necessary that the charge shall impute a punishable offence. To this

there may be an exception in that class of cases, where the words relate to the reputation of a female for chastity. But of such charges, we shall have occasion to speak hereafter.

With this rule in view, then, we are to determine whether to charge a woman with procuring an abortion, in this state, since the first of July, 1851, is actionable *per se*. By the statute of 1843, the willful killing of an unborn quick child, by any injury, &c., was made manslaughter. Revised Statutes, 1843, 167, § 10. This was repealed by the Code, which took effect, July 1, 1851. Since that time, it is conceded, we have no law punishing this offence by name. But it is claimed, that such a child is a *human being*, within the meaning of section 2508, which provides, that whoever kills any human being, with malice aforethought, either express or implied, is guilty of murder. If this be so, then the charge would clearly impute a punishable offence, and would be actionable *per se*. But in this view, we cannot concur. It will be observed, that one of the instructions asked and refused, was, that to charge a woman with causing an *abortion*, was not actionable *per se*, in this state, since the first of July, 1851. The other is to the same effect, except that it uses the words, "before the child is quick." By abortion, we understand the act of miscarrying, or producing young before the natural time, or before the fœtus is perfectly formed. And to cause or produce an abortion, is to cause or produce this premature bringing forth of this fœtus. And, notwithstanding the infant in *ventre sa mere*, is treated by the law for some purposes, as born, or as a human being, yet we are not aware, that it has been so treated, so far as to make the act of causing its miscarriage *murder*, unless so declared by statute. And, certainly, independent of statute, it is not a punishable offence, when the child is not quick in the womb. When the child is born, however, it becomes a human being, within the meaning of the law; and if it shall then die, by reason of any potions or bruises it received in the womb, it would be murder in those who administered or gave them, with a view of causing the miscarriage.

In Russell on Crimes, it is said, that "an infant in the

mother's womb, not being in *verum natura*, is not considered as a person who can be killed, within the description of murder; and, therefore, if a woman being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter." Russ. on Crimes, 390. The statute of 43 Geo. III, c. 58, provided, however, for the punishment of such offences, making the offence, when the child was *quick* in the mother's womb, capital, and if not quick, a felony. The law is stated thus by Blackstone, in his Commentaries, Vol. I, p. 129, "If a woman is quick with child, and by a potion or otherwise, killeth it in her womb, and she is delivered of a dead child, this, though not murder, was by the ancient law, *homicide* or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but only as a heinous *misdemeanor*." To support an indictment for infanticide, at common law, the rule, as uniformly recognized, is that it must clearly appear, that the child was wholly born, and was born alive, having an independent circulation and existence. 3 Greenl. Ev. § 136. If a woman be quick with child, and by a potion or otherwise, killeth it in her womb, and she is delivered of a dead child, this is a great misprision, and no murder. 3 Coke Inst. 50. In *Commonwealth* v. *Parker*, 9 Metcalf, 263, it is held, not to be a punishable offence by the common law, to perform an operation upon a pregnant woman with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman is quick with child. And to the same effect, is the case of the *Commonwealth* v. *Bangs*, 9 Mass. 387. See also the case of *The State* v. *Cooper*, 2 Zabriskie, 52; where this subject is very fully discussed, and many of the authorities collected. These authorities agree in holding, that to cause, or procure an abortion, *before* the child is quick, is not a criminal offence at common law, whatever it may be after the child is quick. And we think it to be equally true, that an infant in *ventre sa mere*, is not a human being within

the meaning of section 2508 of the Code. It is certainly not such, before it is quick in the womb.

To charge a woman with causing or procuring an abortion, is not, therefore, to charge her with the crime of murder under our law; and there being no law punishing such an act in this state, at the time the words were spoken, we think the instructions asked, were improperly refused.

The counsel for appellees claim, however, that the ruling of the court below is sustained by the case of *Reynolds* v. *Daily*, decided in this court, in 1854. The opinion in that case we have not been able to see, and cannot, therefore, say with certainty, how far it is applicable. We understand, however, that the words spoken in that case, imputed a want of chastity to the plaintiff, who was an unmarried female, and that the ground assumed substantially, was, that such a charge would tend necessarily to exclude her from society, and render her infamous in the common sense of that term; and that such a charge was actionable, on the broad, plain ground, that it would immediately and necessarily tend to hinder her advancement in life. And, notwithstanding this may be regarded as a departure from the general rule, heretofore stated, we have no disposition to question its correctness. It is sustained by not a few well considered cases, and is founded in reason and justice. It has its origin, and receives its sanction, in that just jealousy and care with which the reputation of the female for chastity, is guarded in every civilized community. It is true, that courts hesitated in departing this much from the general rule, and many of them still hold that in the absence of a statute punishing adultery and fornication, words imputing a want of chastity are not actionable. And while we concur in what we understand to be the ruling in the case of *Reynolds* v. *Daily*, we do not think it can aid the plaintiff in this action. We think, the reasoning and argument in support of the actionable character of such a charge, cannot apply to the one alleged to have been made in this case. It is true, that to charge a woman with such an act, might injure her in the estimation of the community. And so might many other charges affect her

good name, and yet not amount to the charge of a crime, so as to be actionable, without the averment and proof of special damages. To say of her that she was a common tattler, or liar, or that she indulged in the use of profane or vulgar language; that she was a drunkard, or the like, would reasonably, if believed, have a tendency to bring her into disrepute, but such words would not be actionable *per se*. But to impute to her a want of chastity, is to charge her with the want of that, without which the female is necessarily and certainly driven beyond the circle of virtuous friends and acquaintances. Such a case is an exception to the general rule, is sustained by reasons that apply to it alone, because of the peculiar character of the charge, and beyond it, we are not willing to go at present.

The case of *Malone* v. *Stewart and wife*, 15 Ohio, 319, we do not believe to be law. It has not been followed, as far as we have been able to examine, by any other court, but, on the contrary, its correctness has been denied or questioned, and we think, with propriety. 1 American Leading Cases, 116.

Judgment reversed.

ROBERTSON *v.* SEEVERS.

Where a person for a valuable consideration, receives the money, and undertakes to enter a particular tract of land, for another, but by mistake, enters and conveys a different tract, he is liable to an action for the money, without the execution and tender of a reconveyance of the land so entered and conveyed by mistake.

Where in an action for money had and received, it appeared that the plaintiff furnished the defendant a certain sum of money, and the defendant undertook to enter a certain tract of land for the plaintiff, for which service the defendant received a compensation; that the defendant, by mistake, entered and conveyed to the plaintiff a different tract; and that plaintiff had not, before bringing the suit, made and tendered a reconveyance of the land; and where the court instructed the jury as follows: "That if defendant agreed to enter for the plaintiff, for hire or compensation, the (describing the land the defend-

ant agreed to enter), and by mistake entered instead thereof, the (describing the land conveyed to the plaintiff), the plaintiff can recover, without making and tendering a deed for said last-mentioned tract to defendant," and refused to give the converse of the proposition contained in the instruction; *Held*, That the instruction was correct.

And where in such a case, the defendant asked the court to instruct the jury as follows: "That if he was acting as agent of the plaintiff, and trying to enter a piece of land for him, and by mistake, entered some other piece of land, he is not liable, if he used the prudence and care that were usually exercised in such cases," which instruction was refused; *Held*, That the instruction was properly refused.

Appeal from the Poweshiek District Court.

On the 15th of March, 1854, the defendant herein executed to plaintiff the following receipt:

"Oskaloosa, March 15th.

"Received of John T. Robertson, fifty dollars, to enter the southwest quarter of northwest quarter of section 8, in township 76 north, range 15 west. Jas. A. Seevers."

It appears that for his trouble in and about entering said lands, plaintiff paid defendant, at the time of executing said receipt, one dollar. It is further shown, that defendant did obtain from the proper land office, a duplicate in plaintiff's name, for forty acres of land, answering to the above description, except that it was in range 16, instead of range 15. After he had obtained the same, it was, after a short time, handed to plaintiff, and the mis-description was for the first time observed. The defendant having failed to enter the forty acres described, or to return the money, the plaintiff, after demanding the money or the proper duplicate receipt for said land, brought this suit to recover said fifty dollars, with interest. The defendant in his answer says, that upon discovering the mistake, he immediately presented the duplicate to the proper land office for correction. This is substantially denied in the replication, and no proof is shown to have been made on this subject. There is no proof that before the commencement of the suit, defendant at any time

demanded of plaintiff a deed for the land so entered, or that plaintiff before that time tendered or offered to make such deed. After the suit was commenced, plaintiff executed a deed to defendant, and filed the same as a paper in the cause, for the defendant's use. Whether the alleged mistake has been corrected, is not shown.

No portion of the testimony is made a part of the record. On the trial, it is claimed, that the court gave and refused certain instructions, which giving and refusal to give, the defendant now alleges to have been erroneous. These instructions will be found in the opinion of the court. Plaintiff in the court below, recovered judgment, and defendant appeals.

Wm. H. & J. A. Seevers, for the appellant.

Wm. Loughbridge, for the appellee.

STOCKTON, J.—The first question raised by the defendant is, as to the correctness of the instruction given by the court, at the request of plaintiff. That instruction was as follows:

"That if defendant agreed to enter for hire or compensation, for plaintiff, the southwest quarter of northwest quarter of section 8, township 73 north, range 15 west, and through mistake entered instead thereof, the southwest quarter of northwest quarter section 8, town 76 north, range 16 west, the plaintiff can recover without making and executing, and tendering a deed for said last-mentioned tract to defendant." The defendant insists that this instruction was erroneous, and that the court should have given the instructions asked by defendant, which are as follows:

"1. That if the jury find that defendant agreed to enter a piece of land for plaintiff, and before the commencement of this suit, he entered by mistake, another piece of land, of equal amount and value, in the name of plaintiff, the plaintiff to recover, must show that before the commencement of this suit, he made out and tendered to defendant a deed to said land entered by defendant, by mistake; and that he

made a demand of the money deposited, before he can recover."

"2. That if he was acting as agent of plaintiff, and trying to enter a piece of land for him, and by mistake entered some other piece of land, he is not liable, if he used the prudence and care that were usually exercised in such cases."

It seems, that during the progress of the suit, the plaintiff executed to defendant a deed of conveyance for the forty acres of land, purchased by mistake in plaintiff's name; this deed was filed among the papers of the suit, for defendant's use. It is contended, however, that plaintiff should have executed the conveyance and tendered the same to defendant, before the commencement of the suit. We do not think, that there was any such obligation resting on the plaintiff. There was no necessary connection between his right to receive the money paid to defendant, and the tender of a conveyance for the land, the title of which was in him. It was by no act or consent of plaintiff, that the title of the land became vested in him. The defendant was the cause of the title becoming so vested in plaintiff, and if he wished to divest the plaintiff of the title, he should himself have taken the necessary steps to bring it about. The rights of the plaintiff, as they appear to us, are in no respect increased or lessened by the mistake of the defendant, whereby he, the plaintiff, had become the unwilling depository of the title of the forty acres of land. If plaintiff is entitled to recover of defendant the money paid him, on his failure to comply with his agreement, we do not see how the plaintiff is to be hindered in his right so to recover, by a failure to convey to defendant the title of the forty acres of land, or by the conceded right of defendant to have the title in himself.

The defendant had taken the money of the plaintiff, and had agreed to purchase for him a certain piece of land; there is no excuse shown why he did not perform his contract. It is not shown that the defendant made any effort to have the mistake in the entry corrected. It is not shown that it was not still in the power of defendant to purchase for plaintiff the land he desired, at the government land office. It was

the duty of defendant, either to enter the land as he had agreed to do, or to refund the money when the plaintiff, after a reasonable lapse of time, demanded of the defendant the duplicate receipt for the land, he had agreed to purchase for him. The defendant must either deliver the duplicate, or refund the money; and on his failure to do either, he is liable to the action of plaintiff, without any further demand.

The second instruction asked for by defendant, we think was properly refused by the court. The suit is brought by plaintiff, to recover back the money paid defendant, and not for damages which plaintiff may have sustained by reason of the failure of defendant to enter the land as agreed upon. Defendant may have been acting as the agent of the plaintiff. He may have made a mistake, and entered the wrong tract of land. He may be entitled to demand and have of plaintiff the title of the forty acres purchased by mistake in the name of plaintiff, but no one of these facts, nor all of them combined, can relieve defendant from his obligation to purchase for plaintiff, the land he had in writing agreed to purchase, or to refund plaintiff his money. The liability of defendant is not to be increased, by the degree of care and diligence used by him in his efforts to enter the right piece of land. It is not a question whether he used the "prudence and care usually exercised in such cases?" The question is, whether defendant has performed his written undertaking with plaintiff, and entered for him the land he had agreed to enter? To assume that defendant is relieved of the responsibility of his undertaking by a mistake, whereby the wrong piece of land was entered for plaintiff, would be to establish a principle, which in its application would produce results the most disastrous. The land by the same kind of mistake, might be entered in the name of some third person; a less quantity than that agreed upon, might be entered; or a tract of land wholly worthless; and the agent might claim exemption from all liability to his employer, with the same show of reason. The plaintiff is not so to be put off; he will not be required to correct for himself the mistakes of defendant. If

the latter cannot perform his agreement according to its spirit and intent, the least that can be required of him, is to refund to the plaintiff the money he has received.

As we have before remarked, the suit is not brought to recover damages sustained by plaintiff, by reason of the failure of defendant to enter the land agreed upon. If the suit had been of such a character, the degree of diligence required of defendant by his undertaking, might be a proper subject of inquiry. In the present cause, we think that question entirely irrelevant.

Judgment affirmed.

FORD *v.* WESCOTT.

A replication is not necessary to complete the issue, where it is fully joined by petition and answer.

An answer merely in denial of the petition, is not to be taken as true.

It is the affirmative, and not the negative allegations of an answer, that are admitted by a failure to deny the same by replication.

Appeal from the Marshall District Court.

TRESPASS *quare clausum fregit.* Answer denying specifically all the matters contained in the petition; in substance, the plea of not guilty. No replication was filed, and after the jury was sworn, defendant insisted that his answer being unreplied to, must be taken as true, and objected to any testimony on part of plaintiff to sustain his action. This objection was sustained, and there being no evidence, the jury under the direction of the court, found for defendant. And from the judgment thereon, plaintiff appeals.

Curtis Bates and *Samuel A. Rice,* for the appellant.

Jas. D. Templin and *J. W. Woods,* for the appellee.

WRIGHT, C. J.—This judgment must be reversed. A re-

plication is not necessary to complete the issue, where it is fully joined by petition and answer. An answer merely responsive to the petition, is not to be taken as true. It is the affirmative, and not the negative allegations of the answer, that are admitted, by a failure to deny the same by replication.

Judgment reversed.

HELFENSTEIN & GORE *v.* CAVE.

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Laws relating to contracts and to their enforcement, affect either the contract itself, or the remedy.

Those granting exemptions from execution, affect the remedy.

The exemption of a homestead, subject to the qualifications and limitations propounded in *Bronson* v. *Kinzie*, 1 Howard, 311; *McCracken* v. *Hayward*, 2 Ib. 228; and *Gountley's Lessee* v. *Ewing*, 2 Ib. 608, is as truly a part of the remedy, as the exemption of a horse, or other article of property.

Where a plaintiff brings an action, claiming a right, given under certain conditions or qualifications, he is obliged to bring himself within those conditions; and where a defendant relies upon, and defends under, a similar right, he must do the same.

Where a party defends against an action of right, brought for the recovery of premises purchased at a judicial sale, on the ground, that the premises were his homestead, and exempt from such sale under the act entitled "An act to exempt a homestead from forced sale," approved January 15th, 1849, he must aver that the property was such as the law exempted for a homestead.

If he claims the land as used for agricultural purposes, in addition to the allegation that it is a homestead, he must allege, that it is not situate within a town; that it does not exceed forty acres in quantity; that it is used for agricultural purposes; and that its value does not exceed five hundred dollars.

If the party claiming the homestead, has more than forty acres, the creditor or purchaser may take the excess, without respect to the value. If the forty acres exceeds the prescribed value, the quantity must be reduced, so as to make it consistent with the value allowed.

If the premises; when reduced to the smallest quantity, as to the dwelling-house and its appurtenances; that is, to that which constitutes a messuage, exceeds the given value, it is not exempt as a homstead.

Where the premises exceeds five hundred dollars in value, it must be ascertained whether it can be divided so as to leave a homestead, within the statute limitation. This may be done by the intervention of referees, or in some of the methods of proceeding known to the law.

The intention of chapter four of the Code, was to save all rights existing under former acts, even to the extent of those accruing.

Where a note was dated October 28th, 1850, upon which suit was commenced and attachment levied, on the 9th of June, 1851; and where judgment was rendered in September, 1851, and the levy and sale of the premises took place in 1852; *Held*, That a right to his homestead, if he had one, existed in the defendant, in relation to this contract, under the homestead act of 1849; and that this right was saved by section 31 of the fourth chapter of the Code.

Under the homestead act of 1849, a wife has no right independent of her husband; and she should not be made a party to a suit, or permitted to defend, in relation to the homestead.

Appeal from the Van Buren District Court.

THE plaintiffs had recovered a judgment on a promissory note against the firm of Wyman & Cave; and had levied this execution on the tract of land in dispute. This was levied upon as the property of Cave only. The plaintiffs bring this action, in the nature of an action of ejectment, or of right to recover the land. The defendant sets up a right of homestead on the land, and claims that it was exempt from the execution. The former action, in which the plaintiffs obtained this judgment, was upon a promissory note, bearing date at St. Louis, Missouri, October 28th, 1850. The suit was commenced, and land attached, prior to July 1, 1851. The judgment was rendered September 6th, 1851, and the sale took place in October, 1852, at which the plaintiffs were the purchasers. During the progress of the cause, Delilah, wife of the defendant, Cave, petitioned to be made defendant, and was so made a party, and set up a claim to the homestead, as existing in herself *as a wife*, independently of what her husband may have done, or omitted to do; and claiming that her right could not be compromised by any laches of her husband.

As the pleadings are somewhat voluminous, and are very confused, they are not set out, but a sufficiency of them will appear in the opinion of the court, in connection with the questions made. The counsel have facilitated the understanding of the case, by a statement of the questions raised

and presented for determination. Judgment was rendered for the plaintiffs, and the defendants appeal.

Knapp & Caldwell, for the appellants.

C. C. Nourse, for the appellees.

WOODWARD, J.—The first question made, to which we will turn our attention, is, whether the defendant is entitled to a homestead exemption, against this contract, which was made in the state of Missouri, in October, 1850? The law under which it is claimed, is the act of 1848–9. Session Laws, 1848–9, chapter 124, 152. In point of time, the contract is covered by this act. But, it is urged that the *lex loci contractus* governs the case; and that as the law of Missouri gave no homestead exemption, the defendant has none under this contract.

Laws relating to contracts and to their enforcement, affect either the contract itself or the remedy. Those granting exemptions from execution, affect the remedy. The exemption of a homestead, is as truly a part of the remedy, as the exemption of a horse or other article of property. This remark is made subject to the qualifications and limitations propounded in the cases of *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 228; *Gauntley's Lessee* v. *Ewing*, 2 How. 608. To hold that the laws of other states, where contracts happen to be made, govern in this matter, would introduce great confusion into our midst, and would place our citizens upon unequal ground. The court below held the same view, and there was no error therein.

Another question made, under a demurrer of the plaintiff to the defendant's answer, is, whether the defendant should not allege, that at the time of the attachment, he claimed his right of homestead in the land; or whether he should not allege, that he made this claim at the time of levy and sale; whether he should not allege, that the value of the property did not exceed five hundred dollars; that it was not within a recorded town plat; and that he used and occupied the land

for agricultural purposes? To answer these inquiries, we must look at the statute. It provides that a homestead shall be exempt from forced sale, on final process, for any debt or liability contracted after the 4th of July, 1849; but it prescribes these qualifications, viz: consisting of any quantity of land, not exceeding forty acres, used for agricultural purposes, not included in any recorded town plat, or city, or village, and to be selected by the owners. In the same section (which is one clause or paragraph), is a *proviso*, that the value of such exempted homestead, or town lot, and dwelling thereon, shall in no case exceed the sum of five hundred dollars. The same section, as an alternative for this homestead in agricultural lands, gives not exceeding one-fourth of an acre, being within a recorded town plat, city, or village. The act gives a homestead either in a town or in agricultural lands (that is, in the country). In the latter case, the quantity is increased, but not the maximum *value*.

The homestead exemption owes its existence to statute law entirely, and we must accept of it, if at all, under just the qualifications, considerations, and circumstances, under which the law gives it. We cannot say that the law ought to have been different, and ought to have given the right under different qualifications or fewer conditions. We construe, not make the law. It would seem, from the argument, as though counsel had their eye on a subsequent homestead law, which they esteemed a better one, and pressed the rights of the defendant, under the former act, as if they were created by the latter; or as if the former act should be interpreted by the better provisions of the latter. This we cannot do. The latter act may be a better one than the former, but the former gave what we never had before, and we must take it as given.

In respect to these qualifications defining the right, this act is like many others, only that in the present case, it throws that upon the defendant, which usually falls upon a plaintiff. But this arises from the nature of the case, and is incidental only. When a plaintiff brings an action claiming a right, given under certain conditions or qualifications,

he is obliged to bring himself within those conditions. So it is with this defendant. The plaintiff demands the land as sold and purchased under a judicial sale. The defendant claims, that it was exempt from that sale, by virtue of the statute. To make this appear, he must show that the property was such as the law exempted for a homestead. A smaller quantity is given in a town, than of agricultural land. If he claims the land as of the latter character, he must show it to be such as the statute gives; that it is not within a town; that it does not exceed forty acres in quantity; that it is used for agricultural purposes, and he must come within the proviso limiting its value to $500. He has to allege, that it is his homestead, of course, and why should he not allege the other circumstances? These remarks apply to an instance like the present, where the debtor sets up his homestead exemption, in an action brought to recover the land. The like is true in all cases, where one claims a right given by law, under certain circumstances. He brings himself in his allegations within them. In the present instance, when he claims forty acres of land, he must show that it is agricultural land, and not within a town. He would not be held rigidly to his averment as to quantity and value, in this case, more than in others. His rights do not depend upon an accurate computation, or a correct estimate; upon this point, we are enlightened by the statute. See section 4. By this, it is provided, that if the creditor thinks the debtor lays claim to too great a quantity, he may cause the error to be corrected. And we apprehend that this would be applied to value, as well as quantity. If he has more than forty acres, the creditor may take the excess, without respect to the value. If the forty acres exceeds the prescribed value, the quantity must be reduced, so as to make it consistent with the value allowed.

And this brings us to another question in the case. If the homestead claimed exceeds $500 in value, is he entitled to the exemption? We answer, that, as said above, when the quantity can be reduced so as to reach the given value, this may be done. But if, when reduced to the smallest quantity,

such as to the dwelling-house and its appurtenances; that is, to that which constitutes a messuage, it then exceeds the given value, we see no way in which to give him his homestead. The statute is explicit, that he may have his homestead, provided it do not exceed the value limited upon it. The corollary is clear, that if it does exceed, it is not exempt. It is true that this gives to him who has little, and takes from him who has much, or who has only more. We do not say this is a wise law. It has been changed. But we do not know any other way of interpreting it. Other statutes, with provisoes similarly related, are construed in this manner. There is no provision for dividing the homestead; nor for setting off rents and profits; nor for an extent; nor for selling the whole, and paying the debtor the five hundred dollars, and applying the surplus to the debt; nor is there anything upon which the most liberal judicial construction can build any of these systems.

By section one, the homestead "is to be selected by the owner thereof." That is, he may select which of two or more tracts of land, one being within a town, and one without, or both within, or both without, he will adopt as his home. This is the meaning of these words, rather than that he should *necessarily* set it out by metes and bounds. It would seem from section three, that he may set it apart by metes and bounds, but there is no provision whatever, concerning recording and making such record a notice. But the case does not lead into the solution of this difficulty. It is in terms set down, that when it is not thus set apart by metes and bounds, the debtor may notify the officer at the time of making the levy, of what he regards as his homestead, &c. It would be going too far to say, that this notice could not be given at any time before the levy; but whether it could be given effectively after that, it is not necessary to determine, for the amended answer avers, a notice to the sheriff who held the writ of attachment, and to his successor.

In order to take a connected, and therefore, a more brief and clear view of the statute, we have passed beyond the particular point now under consideration, and have touched

upon several. We return to the question before made, as to the necessity of averring that the defendant made due claim of homestead as to value; as to its not being a town; and as to its being agricultural land. It will be perceived, that this court holds to the necessity of the defendant's making these averments; and, therefore, that the court did not err in sustaining the 4th, 6th and 7th causes assigned in the plaintiffs' demurrer to the defendant's amended answer, *except* so far as they go to the want of an averment, that the land was used and occupied for agricultural purposes, for this averment is made in the original answer.

A third question presented is, whether the defendant should not, in the absence of a claim to the sheriff to have the homestead set apart, allege a record of it, or a notice to the purchaser? Sufficient has probably been said bearing upon this subject. But it is not perceived that the question is raised by any of the pleadings; and besides, it appears to the court, that there is an averment of claim and notice to the officers, and to the plaintiff, distinctly made.

The fourth question is, whether the plaintiff can recover any part of the property, if its value exceeded $500? The plaintiff averred it to amount to $900 in value, to which the defendant demurred, and the court overruled the demurrer. It appears the quantity of land was about thirty-five acres. It has been before suggested, that if it exceeds the proper value, and is divisible, and the quantity can be reduced so as to meet the required value, this must be done. If a claim was made, and this was not done before sale, it must be done now, by the intervention of referees, or in some of the methods of proceeding known to the law. When an end is distinctly pointed out by statute, but the mode is not prescribed, the court will find a method. The overruling the demurrer, was correct, for this does not dispose of the whole matter. There is a fact to be ascertained. If the whole land exceeds $500 in value, it is then to be found whether it can be divided, so as to leave a homestead within the statute limitation.

Another point is, whether the defendant is entitled to a

homestead in this case, under the act of January 15th, 1849, the same having been repealed July 1st, 1851? The important dates are these: the note was dated October 28th, 1850; suit was commenced and attachment levied, June 9th, 1851; the Code went into force, July 1st, 1851; judgment, September, 1851; and the levy and sale in 1852. There may be some force in the answer to the above question, that as the plaintiff commenced his remedy whilst the act of 1849 was yet in existence, the defendant's rights arose at the same time; and that as all subsequent steps in the suit, have relation to that commencement and attachment, so the rights of the defendant relate to the same time, and are to be judged by the law then in being. We do not stop to determine the soundness of this view, for whatever truth there may be in it, a more manifest and satisfactory answer, is found in chapter four of the Code.

This chapter relates to the repeal of former acts; and section 31 provides, that "this repeal of existing acts, shall not affect any act done; any right accruing, or which has accrued, or been established, &c., before the time when such repeal takes effect." Now, under the act of 1849, a right existed in the defendant in relation to this contract, that is, a right to his homestead, if he had one, and this right is saved by the repealing chapter of the Code. The intention of the Code, adopted in 1851, was to save all rights existing under former acts, even to the extent of those yet accruing. There is no doubt in our opinion, but that the rights of the defendant under this contract, were saved by the act of repeal. On this point, therefore, the court did not err.

The remaining question is, whether Delilah Cave, wife of the defendant, should have been made a party, and should have been permitted to make defence? We think she should not, and that herein the court erred. Under the statute of 1849, she has no right, independent of her husband. The argument urged is, that the husband (by section 2) cannot alienate the homestead without her consent; therefore, a judicial sale *cannot take it away*. This does not follow, as of course. By our statute of dower preceding the present one,

the husband could not alienate this right from the wife, but yet a judicial sale would take it from her. And the above argument, if valid, would apply to such a case, as well as to the one before us. It may be indifferent legislation, but it is not bad reasoning, to say that the husband cannot alien the wife's interest, and yet that a judicial sale may take it from her.

But there is another view to be taken of her claim in this cause. If she has rights under the act of 1849, which she may assert separately from her husband, they cannot be such, at the best, as to exonerate her from doing that which her husband was to do—that which the law required. She must at least show, that she has done that which her husband was required to, but omitted to do. She must take the ground, that what he has omitted, she has done; or that as he refuses or neglects to make defence, she should be permitted to do so. Something like this, must be her position. There is no new, different, independent basis of right or law, for her to found her claim upon. The statute is very meagre and deficient upon the other matters above alluded to, it must be admitted; but there is room to doubt whether it intended to confer upon the wife the right here claimed, which is an *independent* right. The utmost that could, in any view of it, be accorded her, would be to defend, if he did not; or possibly to show that she had supplied his omission, by doing some act which he had neglected. But, if she cannot assume one or the other of these grounds, there does not appear any reason for her becoming a party.

We are not inclined to settle the question definitely as to her becoming a party under the above circumstances, since the cause does not demand it; but it seems apparent, that without assuming some such positions, as those above indicated, there is no call or occasion for letting her in. Of what benefit would it be? What would she gain, or what can she do? What is her position, as she asks admission now? The husband appears and defends, and she does not pretend the contrary. She does not claim that he has refused or neglected to do some necessary act, which

she has supplied. She simply sets up a right to the homestead, as the wife of the defendant, and as the mother of a family, without reference to what her husband has done or omitted to do. This claim of right, we cannot recognize, and, therefore, it is our opinion, that the court erred in permitting her to come in as a party defendant.

The character of the cause has led the court to pass over some matters which, upon an observance of rules, would have sent both parties out of court. But as no objection has been made on account of these irregularities, we have preferred to try to determine the questions of the cause, and to recommend both parties to a repleader. The papers are in so great confusion, and sometimes so imperfect, that it will be difficult for either the court or the counsel to proceed with intelligence.

The judgment of the District Court upon the application of Delilah Cave, to be made a party, and upon the supposed want of an averment in the answer, that the land was used and occupied for agricultural purposes, is reversed; and the judgment upon the other questions here presented, is affirmed.

CHEEVER *v.* LANE.

Insufficient service cannot have the effect of quashing the original notice, and dismissing a cause.

At most, it can only affect the service itself, and work a continuance.

The fact of filing the petition after the time stated in the original notice, will not operate to dismiss the cause.

Appeal from the Greene District Court.

THIS is a very confused record, but shows substantially the following facts: On the 1st of August, 1855, plaintiff placed in the sheriff's hands his original notice. This notice states that "a petition is now on file," and was served on

one of the defendants, on the 15th of the same month. At the May term, 1856, of the District Court, defendant appeared, and moved to quash the notice, for the reason that no petition was on file at the time specified therein, and because there was no sufficient service thereof. The date of the filing of said petition is not shown, but it is admitted to have been August 3d, 1855. This motion was sustained, and the cause dismissed. The plaintiff appeals.

Brown & Elwood, for the appellant.

Barlow Granger, for the appellee.

WRIGHT, C. J.—Without inquiring into the sufficiency of the service of notice, we have no hesitation in saying, that this cause was improperly dismissed. Insufficient service cannot have the effect of quashing the notice, and dismissing a cause. At most, it could only affect the service itself, and work a continuance. The fact of filing the petition after the time stated in the notice, would not operate to dismiss the cause. This same question was before this court, in the case of *McCaffrey* v. *Guesford*, 1 Iowa, 80, and we see no reason for disturbing the ruling there made.

Judgment reversed.

GAMMEL *v.* YOUNG.

Where a bill in chancery alleged that Y. owned a mill site, which was out of repair, and in order to repair it, and keep it from going to waste, obtained assistance from the complainant, who became liable as surety, and thus enabled Y. to obtain repairs and materials to the amount of $408.86; that Y. died on the 7th of September, 1846, leaving a widow and six children, three of whom were minors; that after the death of Y. the complainant paid the said amount of $408.86, with the understanding that he was to be paid from the property, and the rents and profits thereof; that G. was appointed administrator upon the estate of Y., and with the consent and approbation of the county court, and the widow, carried on the business of the deceased, and at-

tended generally to the care and management of the whole property; that after the death of Y. the said mill property still requiring repairs and improvements, the complainant made other large advances, amounting to more than $950, which were expended in making repairs, &c., that were absolutely necessary; that on the 14th of June, 1851, the administrator, with the approval of the said court and the widow, executed to complainant a lease of the premises for one year, with the privilege of renewal for one, two, or three years, at a rent of $400, payable quarterly; that complainant went into possession, and so continued until the 9th of November, 1852, and accounted to the administrator for the rents, with the approbation of the widow and the court; that on the 1st of September, 1851, the complainant purchased the interest of the three heirs of Y. who were of age; that on the 18th of April, 1852, C. was appointed guardian of the estate of the minor heirs, and in May following, commenced a suit to recover possession of the premises; that the complainant set up as a defence to that suit, the advances made by him on the premises, and his right to a lien, which defence was sustained by the District Court; that on appeal, the Supreme Court reversed the judgment, and intimated that the defendant's remedy must be sought in equity, which cause is still pending; that the widow was virtually a party to the cause, by her aid and encouragement therein; that prior to the appointment of C. as guardian, the administrator acted virtually as the guardian of the interest of the minor heirs; that on the 20th of February, 1852, the widow instituted proceedings for dower in the premises, and claiming that she was entitled to dower in fee simple; that a sale of the property was made by order of the court, and one W. became the purchaser; that W. by fraud and misrepresentation, procured L., the sub-tenant of complainant, to attorn to him, and he thus obtained possession of the premises; that complainant had no legal notice of this proceeding, and the proceedings and sale are illegal and void; that the widow then commenced proceedings in the county court, showing the sale to W. for $1,800, alleging that a portion of her dower was not secured, and praying the appointment of referees, &c., in which suit, the complainant pleaded the matters set up in this bill; that the rents and profits received by him, have not, as yet, been sufficient to repay the money loaned and advanced; and that W. had full notice of the equities of complainant; and where the bill made the widow, the administrator, the minor heirs, and the purchaser, parties defendant; and prayed that the proceedings in dower, be declared null and void, and to give no title to W.; that the whole of the matters in dispute, and the matters of account be settled; and that the rights of the parties, one with another, concerning this property, and matters growing out of it, be established; and where the bill was demurred to, on the ground that it is multifarious, ambiguous and uncertain, and for the reason that the complainant had not attached any bill of particulars to his bill, nor in any manner shown how much of the money advanced had been paid, nor how much remains due, which demurrer was sustained.

Held, 1. That if the object of the bill was only to establish a lien on the property for the money advanced, that the respondents were properly made parties.

2. That in order to establish such lien, it was not necessary to set aside the proceedings in dower, and W.'s title under them, *altogether*.
3. That the proceedings in dower, and the subsequent sale, were subject to the lien of the complainant.
4. That if it was the purpose of the bill, to set aside the proceedings in dower, and the sale to W. under them, in addition to establishing the lien of the complainant, the bill was multifarious.
5. That the bill aimed at establishing the lien only, and was not multifarious.
6. That the bill was defective in not making a statement, showing his settlement with the administrator, and the amount of money still due the complainant.

Appeal from the Jackson District Court.

THIS cause stands on demurrer to a bill in chancery. The facts alleged, are substantially as follows: That David Young owned a mill site in Jackson county, which was out of repair, and in order to repair it, and keep it from going to waste, he obtained assistance from the complainant, who became liable as surety, or in some manner, and thus enabled Young to obtain repairs or materials to the amount of $408.86, which Gammel paid after the death of Young. This was under the understanding that Gammel was to be paid from the property, and the rents and profits of it. Young died on the 7th of September, 1846, leaving a widow and three minor children, and three children of age. John Galloway was appointed administrator upon the estate, and with the consent and approbation of the probate court, and of the widow, carried on the business of the deceased, and attended generally to the care and management of the whole property. The petition further alleges, that after the death of Young (but what time, is not stated), the said property still requiring repairs and improvements, he made other large advances, amounting to more than nine hundred and fifty dollars, which were expended in making repairs, &c., which were absolutely necessary. On the 14th of June, 1851, Galloway, the administrator, with the approval of the said court and of the widow, executed to Gammel a lease of the premises for one year, with the privilege of renewal for one, two or three years, at a rent of $400, payable quarterly. Gammel went into possession, and so continued until the 9th

of November, 1852, and accounted to the administrator for the rents, with the approbation of the widow and the court. On the 1st of September, 1851, Gammel purchased the interest of the three heirs who were of age. On the 18th of April, 1852, Curry was appointed guardian of the estate of the minor heirs, and in May following, commenced a suit to recover possession of the premises. Gammel set up as a defence the above matter of the advances, and his right to a lien; which defence the District Court sustained. But, on appeal, the Supreme Court reversed the judgment, and intimated that the complainant's remedy, if he had any, must be sought in a court of equity. That cause is alleged to be still pending. The bill charges that the widow was virtually a party to the cause, by her aid and encouragement therein. The complainant also alleges, that prior to the appointment of Curry, the administrator acted virtually as the guardian of the interest of the minor heirs. On the 20th of February, 1852, the widow instituted proceedings for dower in the premises. It is averred that the proceedings were conducted as upon the ground, that she was entitled to dower in fee simple. A sale of the property was made by order of the court, and one Wynkoop became the purchaser; and it is alleged that Wynkoop, by fraud and misrepresentation, procured John Levan, the sub-tenant of Gammel, to attorn to him, and thus obtained possession. Plaintiff claims that he had no legal notice of this proceeding, and that the proceedings and the sale are illegal and void. Mrs. Young, the widow, then commenced a proceeding in the county court, showing the sale to Wynkoop for $1,800, and alleging, that a portion of her dower was not secured, and praying the appointment of referees, &c. In that cause, Gammel pleaded the substance of the present bill. The bill alleges that Wynkoop had full notice of Gammel's equities. Complainant further avers, that the rents and profits received by him, have not, as yet, been sufficient to repay the money loaned and advanced. And the bill prays that the above proceedings in dower, be declared null and void, and to give no title to Wynkoop; that the whole of the matters in dispute, and

the matters of account, be settled, and the rights of the parties one with another, concerning this property and matters growing out of it, be established. To this bill the defendant demurred, and the court sustained the demurrer. But upon what ground it was sustained, or whether upon all, does not appear.

Smith, McKinlay & Poor, for the appellant.

Before proceeding with the points made by the demurrer, we will state briefly the principles on which the bill is founded:

1. The contract between Gammel and Young, before Young's death, entitles Gammel to a lien on the land, for the amount of moneys furnished by Gammel, up to the time of Young's death. And even if Wynkoop had any title, it would be subject to this lien, for the bill charges him with notice of the rights and interests of Gammel. 1 Story's Eq. Juris. § 395; also § 506, as to lien.

2. It was the duty of the guardian, and Galloway was virtually the guardian, to maintain the mill property. See Magna Charta, 49 and 50, Art. III, (5) and 69, (V). And having expended moneys for repairs absolutely necessary for the maintenance of the property, which moneys were furnished by Gammel; then Gammel should have a lien on the property for the repayment of these moneys. See 1 Domat, 683, § 1742; 4 Kent's Com. 370; 2 Story's Equity Juris. §§ 1237 and 1239; *Green, admr. of Ross* v. *Grimshaw*, 11 Illinois, 391. And Wynkoop had notice of Gammel's rights and interests; so, even if he obtained any title by purchase, it was subject to these rights.

3. Gammel made purchase of one-half of the place, from three of the adult heirs, and obtained a lease from Galloway, with consent of the widow, of the other half; he had, therefore, rightful possession of the premises, and while in possession, he accounted for the rents and profits at their fair and reasonable value. What more could be demanded than that one tenant in common, who had possession of the whole,

should account with the other tenant in common, for the rents and profits at their reasonable value?

4. The title of Wynkoop is wholly void, because it is founded on a proceding that is erroneous and illegal from beginning to end.

First. David Young died in September, 1846, and by the law then in force (Revised Stat. 1843, p. 722, chap. 13), his lands, subject to his debts, became vested in his children. It ceased to be the estate of David Young, deceased, except so far as the debts (if any) of said Young were concerned, and became the estate of his heirs. Notwithstanding this, five and a half years thereafter, namely, in February, 1852, Mrs. Young commenced proceedings in the county court, for her dower in the lands; but the county court had not jurisdiction, for not being the estate of a decedent, it did not come within section 1272 of the Code, where the jurisdiction of the county court is defined.

Second. At the time of the death of Young, the only court that had jurisdiction in dower, was the District Court. See Revised Stat. of 1843, p. 527; and Laws of 1846, p. 2. And the interest of the doweress was only one-third *for life;* and the way in which that third was to be given her, when the property was not susceptible of assignment by metes and bounds, was "that the widow shall thereafter enjoy one-third of the rents and profits of said property." See Laws of 1846, p. 2.

The dower given by the Code, section 1394, is an entirely different thing; it is *one-third in fee simple*; and the manner it was to be given, when it could not be assigned by metes and bounds, is adapted only to a fee simple interest. And so, even if the county court had jurisdiction in regard to dower in this property, it could only proceed in accordance with the statute of 1846, because the Code provided no remedy in lieu of that in that statute.

Third. No writ or other legal authority issued to the sheriff, for the purpose of selling said premises, &c., &c. See bill. The paper under which the sheriff acted, does not run in the name of The State of Iowa, or State of Iowa. It is headed:

"IN THE MATTER OF THE DOWER OF ELIZABETH YOUNG. } *Report of Referees.*

"To the sheriff of said county greeting:"

Thus it does not even show what sheriff is meant. There is no *teste*, but there is what purports to be a certificate by Fred. Scarborough, clerk of the county court, under the seal of the county court. But it is not the seal of the county court that is affixed; on the contrary, the seal is that of the District Court. The return shows Wm. T. Wynkoop to be the purchaser at eighteen hundred dollars; and Wynkoop, intending, as it would appear, to make sure of his grab, writes a certificate that *he* bid off the within premises, for the sum of eighteen hundred dollars; and then the sheriff states that Wynkoop paid fifteen dollars and seventy cents to apply on costs. That the sheriff could not act without a writ properly addressed to him and properly tested, is too plain a proposition, to require any argument or citation of authorities.

5. Gammel makes no extravagant prayer; all he asks is, that an account be taken of what is due to him for moneys advanced for and used in making repairs absolutely necessary for the preservation of the estate; that the amount of his account be declared a lien on the land; that his purchase from three of the heirs be protected; and that the bogus proceedings in dower be declared null and void. He does not deny Mrs. Young's right to dower, nor Mr. Wynkoop's right to get back his $15.70. He asks that all matters of dispute be settled, and the rights of the respective parties ascertained.

Now as to the points made by Judge BOOTH:—

1. To his first point, we quote the words of the bill: "And that as yet the rents and profits received by your orator, have not been sufficient to repay the said expenditures of the money of your orator."

2. The limitation mentioned in the acts relative to estates of decedents, is no bar to the claim of plaintiff. For the moneys expended during the lifetime of David Young, the complainant had an equitable lien on the estate—on the land itself; besides that was the very agreement which Gammel had with Young. The moneys expended since, were not ex-

pended for David Young or his estate, but on the estate left by David Young, which had descended to his heirs. See the Revised Stat. 1843, 722, chap. 13. See also 4 Kent, 370, and 2 Story's Eq. Juris. §§ 1235, 1236, 1237, and 1239, and the authorities there referred to.

3. A person who held a claim against the intestate, or his widow, or his heirs at law, or against the land, has certainly a great interest in seeing that the property left by the deceased, does not pass away from the heirs by an invalid, illegal, irregular, and void proceeding.

4. The bill shows that Galloway was virtually the guardian of the estate of the minors; that all parties, including the probate court, had mistaken the position of an administrator, and had acted with Galloway, and allowed him to act both as administrator and as *virtual* guardian of the minors' estate. This is not such a great mistake, but what a court of equity will give relief.

5. The action at law has to do with the case, as it shows that Gammel understood his position, but that as *his counsel and the District Court* did not understand the difference between law and chancery as applied to his case, he was put to some delay and expense; and it accounts for delay. But Judge BOOTH is altogether wrong in fancying, that *admeasurement* is the only point in the case. Gammel bought long before the proceedings in dower. He was one of the persons whose duty it was to assign dower. Why didn't she apply to him for it? and if he should have refused, would the county court have been the proper place to sue for it? That the county court should have jurisdiction in dower, five and a half years after the decease of the husband, and after half of his heirs had transferred their title, is altogether preposterous.

6. Wynkoop had a great deal to do with the matters of account on the part of Gammel. Wynkoop at the time he made his "pretended purchase from the said sheriff, was fully aware of, and had notice of the rights and interests of your orator." He bought subject to Gammel's equities, and having done so, he must permit Gammel to enforce them. And this, whether the pretended title be good or bad.

7. The claims of Gammel have already been set up in a court of law, and the Supreme Court held, that a court of equity was the proper forum. We presume the Supreme Court will hold the same again. Gammel would have a poor show, if law said, "you must go to equity," and equity said, "you must go to law."

8. The remedy at law is not as complete, for a court of law has no right to decree an equitable lien, such as that asked for by Gammel, and recognized in 2 Story's Eq. Juris. before referred to. Gammel is obliged to come into equity by reason of the decision of the Supreme Court in the law case, and when a court of equity gets hold of a matter, it will try to do complete justice all round. *Cathcart* v. *Robinson*, 5 Peters, 264; *Oliver* v. *Pray*, 4 Hammond, 175; Story's Eq. Juris. § 72.

9. The Code gives one-third as dower, and the *remaining* estate it gives to the children; see section 1408. The law in force in 1846, gave all of the estate to the children, and left them to give the widow her dower; and if they did not, she might sue for it in the District Court, and recover it there. She ought to have asked Gammel for her dower; her right accrued in 1846, and she could have only the remedy applicable to such right. The right of dower given by the Code is altogether different, and the remedy in the Code is applicable only to it. Section 1394 of the Code is no more retrospective than section 1408 is. The land of an intestate who died subsequent to the taking effect of the Code, leaving a widow, was subject to a deduction of one-third for her dower, and the remaining two-thirds descended to the children. They did not inherit the whole, subject to dower, thereby giving them the whole, in case dower was not demanded; for the Code is imperative that the county court shall set out one-third in fee for the widow, and after this third is set out the *remainder* goes to the children. Whereas, in 1846, the whole went to the children, not two-thirds only; and if they refused to assign dower to their mother, she had her action in the *District Court*, and in that court only.

10. The only intent of section 2025 of the Code, as to de-

mand, is that a person shall not be put to the expense of a suit, unless he was unwilling to give the matter sued for. If she had applied to Gammel, she might have had her dower without any proceeding in a court at all. Her right was to have one-third of the rents and profits for life, in case dower could be admeasured. She had no right to one-third in fee, nor to one-third of what the land could be sold for.

11. The county court never acquired jurisdiction; and even if it did, the District Court has a right to inquire into the proceeding. Code, § 1576. The Court of Chancery in passing upon the rights of the respective parties, must pass upon Wynkoop's title or want of title. The assumption of jurisdiction by the county court, is an abuse which the District Court may very properly correct. The examination as to the regularity or irregularity of a proceeding, may be examined at any time in any case, where the irregularity is apparent of record, and is so bad as to make the title void.

12. Gammel's remedy at law against Wynkoop, is not ample. Gammel has only one-half by purchase, and he claims a lien for certain moneys on the whole. The Supreme Court has decided that that lien can be enforced only in equity. In order to enforce it, he has to bring into court those whom he acknowledges to be the owners, and who are the owners; but in order to have a complete settlement of the matter, he has also to bring in the doweress, and as she pretends to look to money now, instead of the land, he has to bring in the persons connected with the dower proceedings, and thus Wynkoop comes in. Besides, Wynkoop is one claiming title, and there cannot be a complete settlement of the difficulties, without his being made a party.

13. Void orders and void proceedings of the county court are always void. The county court had no jurisdiction over Gammel, or his interest in the land obtained by purchase from three heirs, and even if he had been made a party to the dower proceedings, the court could not have proceeded so as in any way to disturb his title. A person who is no party to a proceeding, is not obliged to appeal; he may attack it at any time.

J. B. Booth, for the appellees.

1. It does not appear by the bill, but that the advance made by Gammel to, and for the intestate, may have been paid off and discharged; nor does he set forth and claim any specific amount due him, from the infant heirs of David Young, deceased, for improvements and repairs, made after the decease of the intestate; nor is there any copy of his account annexed to the bill or pleading, as required by section 1750 of the Code.

2. The pretended claim of plaintiff against the estate of intestate, cannot now in law or equity be urged at this late period, as nothing is alleged in the bill, by which it appears that the plaintiff has ever presented it, or proved it up, as required by both the Code and the law, as it existed at the time of the decease of testator. Code, p. 210, §§ 1864, 1865, 1866, &c. See remarks of Justices RADCLIFF and KENT, in the case of *LeGreen* v. *Gouverneur & Kemble*, 1 Johnson's Cases, 491.

3. Several causes of action cannot be united in the same petition or bill, unless all the parties thereto, are affected in the same capacities. Code, 255, § 1751.

4. Therefore a petition or bill, with or concerning things of distinct natures against several persons, is demurrable. 2 Maddock's Chancery, 230 and 233; Blake's Chancery, 109, 110 and 111; Mitford, 169.

5. What has the validity or invalidity of the title of the defendant, Wynkoop, to do with the plaintiff's claim against the estate of intestate, or against his widow and heirs at law, since his death?

6. What has the claim against the defendant, Galloway, as administrator of said deceased, to do with the real estate, or the admeasurement of the widow's dower?

7. What has the action at law of the infant children of intestate, for the recovery of their rights in the real estate of which the plaintiff was in possession, to do with the question of admeasurement of dower, or the enforcement of a professed claim by the plaintiff against the estate of said intestate? And

8. What have the defendants, Elizabeth Young and Wynkoop, to do with the matters of account on the part of plaintiff, and now set up by him against the estate of said deceased?

9. In the admeasurement of dower, the order confirming the report of referees, and all other orders of the county courts, if not appealed from in thirty days, shall be binding and conclusive. Code, 214, and 26.

10. The county court had jurisdiction. Code, 201.

11. The bill neither charges combination, or seeks for a discovery of any matter or thing whatever, and is, therefore, demurrable. 1 Story's Eq. Jurisprudence, §§ 458 and 458 letter *a*. Only where there are mutual accounts and a discovery wanted, will the court of equity entertain jurisdiction. See the remarks of Justice SPENCER, in the case of *Post* v. *Kimberly*, 9 Johns. 501. In which case, it will be seen that the rights and interests of infants cannot be affected.

12. If the proceedings of the county court were *coram non judice*, as alleged in the bill, then clearly the court of equity will not entertain jurisdiction, or interpose; as the plaintiff has ample remedy at law. See Code, § 2025; 2 Story's Eq. Juris. § 700, letter *a*.

13. One tenant in common, alone has a right to set up and enforce a lien, and have a lien for repairs against his co-tenant in a court of equity. 2 Story's Eq. Juris. §§ 1235, 1238.

14. If true, as alleged in the bill, that Wynkoop obtained possession of the premises in question, by "*fraud and misrepresentation*," then surely this court will not entertain jurisdiction, inasmuch as the plaintiff has ample and summary remedy at law. Code, p. 319, § 2362, and sub sec. 1.

WOODWARD, J.—One ground of the demurrer is, that the bill is multifarious, ambiguous, and uncertain; and it is said to be multifarious, because it unites several distinct complaints against several persons, who are not connected with them all in the same capacity, and who are not all concerned in all the matters of complaint. If this be so, the bill is demurrable. But the determination of the question, depends

upon the view which is to be taken of the bill. This is inartificially drawn, and is wanting in that fullness of statement and clearness of object, which is desirable. There is an obscurity—almost an uncertainty—whether it is intended as a bill merely to establish a lien on the property for the money advanced, or whether with that, it unites the object of setting aside the proceedings in dower, and the sale under them, and Wynkoop's title as the purchaser. In a bill for such a lien, it was entirely proper, and perhaps necessary, to make all these persons defendants; that is, the widow, the administrator, purchaser, and the minor heirs. The complainant himself represents the three adult heirs. All these have a direct interest to be affected, except the administrator, and he represents the personalty, and was the one, to whom, as we infer, part of the money was in fact advanced, as he was carrying on the business of the deceased. The claim being for a lien on the estate, these persons are rightfully made parties.

To prosecute this purpose, however, it is not necessary to set aside the proceedings in dower, the sale, and Wynkoop's title *altogether*, and to hold them void. All that would be legally *requisite* is, to hold these subject to the lien. But if the purpose be to effect the above objects, in addition to establishing the lien, then the bill would seem to become multifarious. The proceedings in dower, and Wynkoop's title under the sale, are essentially independent of the question of lien. Gammel, so far as regards his *lien*, requires only a *priority* over them, and does not need to call for their total avoidance. But as a claimant of title to one-half of the property, he might well ask that these proceedings be held void. In this light, however, neither the administrator, nor the minor heirs, are proper parties, whilst the widow and purchaser would be necessary. Now, there is but one thing which seems strongly to support the idea, that the bill is brought to try the question of title between the complainant and Wynkoop, and that is the prayer of the bill, that the proceedings in dower be declared void, and to give no title to Wynkoop. The tenor of the bill seems to aim at a lien,

and although this prayer, taken literally, is too broad, yet we are inclined to think it may be limited to the above object of a lien, and to mean that the proceedings may be set aside so far as to let in the lien. This construction would give the bill a meaning consistent with the party's rights, and therefore, is the preferable one to adopt.

Another ground of demurrer is, that the complainant does not annex a bill of particulars to his petition; nor in any manner show how much of the money advanced, has been paid, if any; nor how much remains due. He implies that part has been paid, by the allegation that the rents received have not as yet been sufficient to discharge the debt. Every principle of legal procedure and of pleading, requires that the demand made by a suit, should be distinctly stated, and that a money demand should be shown with accuracy; and the rule would be the same when a lien is sought to secure that demand, for the lien must be for some definite sum. What if the court had decided to enter up a decree against the respondents, under this demurrer (they not answering), or what if it was called upon, under a default or confession, to decree that the administrator pay the amount due to petitioner from the proceeds of the sale to Wynkoop, for what sum could it grant a lien, or decree a payment? The bill is defective in this respect. But this view does not stand merely upon the technical grounds suggested in the demurrer, but upon the broader base, that the plaintiff himself alleges that he was to be repaid from the property by its rents and profits; that these have not *yet* been sufficient to remunerate him; and that he has settled with the administrator, and accounted for the rents; and yet he makes no statement of the result of that accounting, nor of how much he has received. On the basis of his own bill, then, without referring to the rule in pleading, he should make a showing of these matters.

The bill is defective in clearness on the question, also, as to when and to whom, these advancements were made, which were made after the death of Young. Perhaps it might be inferred reasonably, that they were to the administrator, who was carrying on the business. But there is no cer-

tainty of the correctness of this inference. And whether the money was advanced, or the improvements made, before or after the complainant went into possession under his lease; whether before or after he purchased one-half of the property from the adult heirs, is left entirely uncertain. The extent and manner of complainant's remedy, as well as the question whether he has a remedy of the nature sought, might be much affected by these considerations. And were we obliged to determine under the present aspect of the case, whether he is entitled to a lien, we should be compelled to do it under a view the most unfavorable to the complainant. But it is sufficient to leave this question, until it may be presented under a clearer statement of facts, and to sustain the demurrer upon the points in which the bill has been before stated to be deficient. This reverses the decision of the District Court upon the allegation of multifariousness, and affirms its decision upon the allegation of ambiguity and uncertainty. Upon the foregoing grounds, the judgment of the District Court is affirmed.

McMillan *et al.* *v.* Lee County and Boyles, County Judge.

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The submission by the county judge, of three several propositions at the same time, to a vote of the people, will not of itself render invalid the proceedings under such submission, if each proposition submitted, in other respects meets the requirements of the law.

In order to render the vote of any validity, and to confer any authority by it upon the county judge, all the requisites of the statute must be complied with, in reference to each question or proposition submitted to the vote.

No vote of the people adopting a proposition submitted to them, involving the borrowing or expenditure of money, is of any effect, unless there has accompanied the question submitted, a provision for levying a tax to pay the subscription or money borrowed, and unless the people adopt the tax also.

It is not required under the law, that there should be a distinct provision for levying the tax, in the proposition submitted to the people, to be voted for separately from the question of subscribing the stock; but to render the vote adopting the proposition to subscribe stock in the name of the county, of any

effect, the proposition, and each of them, if more than one is submitted, must be accompanied by a provision for laying a tax to pay the subscription.

As every proposition for the borrowing or expenditure of money by a county, and for the laying a tax to pay the same, receives its vitality as a law, from the majority of the votes of the people cast in its favor, the vote of the people should be permitted to be cast for or against the proposition submitted, without restraint upon the free expression of their choice.

Where in a proceeding to declare certain proceedings of the county judge of Lee county illegal and void, and to restrain him from taking stock in the name of the county in three several railroad companies, and from issuing the bonds of the county in payment thereof, the petition alleged, that the said county judge was about to subscribe stock for the use and benefit, and in the name of the county of Lee, in three several railroad companies (naming them), to the amount of $150,000, in each, and to issue the bonds of the county for that sum, payable in twenty years, with eight per cent. annual interest, payable semi-annually in the city of New York; that to provide for the payment of the interest and principal of said bonds, it was proposed to levy an annual tax of one per centum on the real and personal property of the citizens of said county, so long as the same may be necessary for the object intended; that the county judge claimed to exercise this right and authority by virtue of certain proceedings, which are set out in the petition, from which it appears that at a special election, directed to be held at the usual places of holding elections in Lee county, on the 10th of September, 1856, the electors of said county were required to determine by their votes, whether the county of Lee should subscribe for stock to the amount of $150,000 in each of three railroad companies, (naming them); the said stock to be paid in the bonds of said county, bearing interest at the rate of eight per centum per annum, and whether in addition to the usual taxes, an annual tax of not exceeding one per centum on the taxable property of the county, to be continued from year to year, so long as the same was required, should be levied, to be applied to the liquidation of the principal and interest of the bonds aforesaid; that the electors were required to vote on each proposition for the subscription to the stock of each of said railroad companies, separately; that it was stipulated in the proposition submitted, and the notice given to the electors, that a majority of the votes given for each proposition for subscription of stock, should be considered as an adoption of the same; but that the subscription should not be made to either of said companies, unless there should be a majority of the votes cast in favor of each and all of them; that on the 26th of September, 1856, the county judge being satisfied that all the requirements of the statute in regard to said election, had been substantially complied with, and that a majority of the votes cast at said special election, were cast in favor of the subscription to the stock of each and all of said railroad companies, caused the propositions aforesaid, and the result of said election, to be entered at large in the minute book of the county court, as required by law, in order to give said vote and the entry thereof on the county records, the force and effect of an act of the General Assembly of the state of Iowa, which petition was

demurred to; and where the court sustained the demurrer, and dismissed the petition; *Held*, That the court erred in sustaining the demurrer, and dismissing the petition.

Appeal from the Lee District Court.

THE petitioners, twelve in number, residents of Lee county, and tax payers therein, applied by petition to the District Court of Lee county, sitting at Fort Madison, to have certain proceedings of the county judge of said county declared illegal and void, and for an injunction to restrain him from taking stock in the name of the county, in certain roads mentioned in the petition, and from issuing the bonds of said county in payment thereof. The petition represents that the county judge is about to subscribe for stock, for the use and benefit, and in the name of the county of Lee, in three several railroad companies, that is to say, in the Fort Madison, West Point, Keosauqua, and Bloomfield railroad company; in the Keokuk, Fort Des Moines, and Minnesota railroad company, and in the Keokuk, Mount Pleasant, and Muscatine railroad company, in each the amount of one hundred and fifty thousand dollars, and in the aggregate the amount of four hundred and fifty thousand dollars, for which he is to issue the bonds of the county of Lee, payable in twenty years, with interest payable semi-annually in the city of New York, at the rate of eight *per centum per annum*. That to provide for the payment of the interest and principal of said bonds, it is proposed to levy an annual tax of one *per centum* on the real and personal property of the citizens of said county, subject to taxation, so long as the same may be necessary for the object intended. It is further represented, that the county judge claims to exercise the right and authority in the premises, by virtue of certain proceedings, which are fully set out as part of the petition. From them we learn, that at a special election, directed to be held at the usual place of holding elections in Lee county, on the 10th of September, 1856, the electors of said county were required to determine by their votes, whether the county of Lee should subscribe for stock to the amount of one hundred and fifty

thousand dollars, in each of said railroad companies; the said stock to be paid in the bonds of said county, bearing interest at the rate of eight *per centum per annum*, and whether in addition to the usual taxes, an annual tax of not exceeding one *per centum* on the taxable property of the county, to be continued from year to year, so long as the same is required, should be levied, to be applied to the liquidation of the principal and interest of the bonds aforesaid. It further appears from said proceedings, and from the notice given by the county judge of said special election, that the electors were required to vote on each proposition for the subscription to the stock of each of said railroad companies, separately; that it was stipulated in the proposition submitted, and the notice given to the electors, that a majority of the votes given for each proposition for subscription of stock, should be considered as an adoption of the same, but that the subscription should not be made to either of the said companies unless there should be a majority of the votes cast in favor of each and all of them. On the 26th of September, 1856, the county judge being satisfied that all the requirements of the statute in regard to said election, had been substantially complied with, and that a majority of the votes cast at said special election, were cast in favor of the subscription by the county to the stock of each and all of said railroad companies, caused the proposition aforesaid, and the result of the votes at said election, to be entered at large in the minute book of the county court, as required by law, in order to give to said vote, and the entry thereof on the county record, the force and effect of an act of the General Assembly of the state of Iowa.

The petitioners allege, that their property will be injuriously affected by the subscription to the stock of said railroad companies, the issuing of said bonds by the county of Lee, and the levying of the tax in the manner set forth; and that the number of persons interested in the question is so great as to render it impracticable to bring them all as plaintiffs before the court. They charge that the county judge has no power, under the constitution and laws of the state, to take

stock for the county of Lee, in said companies, as he is intending to do; and that if he has authority to take and subscribe for stock at all, it can only be conferred by a vote of the people of the county, taken in accordance with law, in which each proposition for subscription of stock by the county, shall be voted for as a distinct and separate proposition, depending on its own merits, and not by a proceeding which unites two or more propositions, and makes the success and adoption of each one, depend upon the adoption of all. They, therefore, charge that the whole of the proceedings of the county judge in the premises are void, as without authority of law; and pray that the same may be so declared, and for an injunction and relief.

At the October term, of the District Court for Lee county, sitting at Fort Madison, the defendants appeared, and filed their demurrer to plaintiff's petition, which demurrer was sustained by the court, and the petition dismissed. From this decree the petitioners appealed to this court; and the parties are agreed, that the question presented for the decision of this court is, as to the power of the county of Lee to vote for said railroad subscriptions, so as to render them valid and binding on the county, and to authorize the issue of bonds in payment thereof, as set forth in said petition, by virtue of the propositions submitted by the county judge to the vote of the people of said county.

F. Semple, for the appellants.

Geo. W. Dixon, for the appellees.

STOCKTON, J.—Several questions have been discussed with great ability and research by the counsel on both sides, on which the decision of the court is desired. If the objections taken by the complainants to the proceedings of the county judge, shall be sustained, the result must be, that the decree of the District Court should be reversed, and the relief prayed for by them granted. Our examination will first be given to the inquiry, whether the power vested by the statute in the county judge, of submitting certain

questions to the vote of the people of his county, has been exercised by him in a proper, legal, and binding manner, in submitting to the vote of the electors of said county, at the special election, the question of subscribing for stock in said railroad companies, in the manner and with the condition thereto annexed, as set forth by complainants. The authority of the county judge in the premises, is derived under chapter 15 of the Code, §§ 114, 115, 116, *et seq.* It must be taken as a conceded question, that if the power attempted to be exercised by him, has not been conferred by the sections above cited, it has in no other manner been conferred upon him, and his proceedings in the matters complained of, have been illegal and void. The county judge is authorized to submit to the people of his county, at any general election, or at a special election called for that purpose, the question whether the county will aid to construct any road which may call for an extraordinary expenditure. Section 114. In submitting such questions to the vote of the people, the whole question, including the sum desired to be raised—the amount of tax to be levied—the time of its having operation or taking effect—the forms in which the question shall be taken—and a copy of the question to be voted upon—are to be duly published and posted up at each place of voting, during the day of the election. Section 115. When the question to be voted upon, involves the county in the expenditure of money, it must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes; and no vote adopting the question proposed, is to be of any effect, unless it adopts the tax also. Section 116. The county judge, on being satisfied that a majority of the votes cast, are in favor of the proposition submitted in compliance with the requirements of the law, shall cause the proposition and the result of the vote thereon, to be entered at large in the minute book of the county court, and notice of its adoption to be given, and from the time of entering the result, the vote and the entry thereof, on the county records, shall have the force and effect of an act of the General Assembly. Section 119.

It is claimed, that in the exercise of the authority vested in him, by virtue of the above provision of the Code, the county judge of Lee county has not proceeded in conformity to law. The irregularity is charged to consist in his submitting to the vote of the people, at one and the same time, propositions to subscribe to the capital stock of three railroad companies, one hundred and fifty thousand dollars, in each of said companies, and in his making the adoption of each one of said propositions, depend upon the adoption of all. After the most careful and attentive consideration which we have been permitted to give to the subject, we have not been able to arrive at the conclusion that the proceedings of the county judge of Lee county, have been authorized by law. We shall proceed to point out the particulars wherein we deem his acts in the premises have been irregular, and consequently void.

The question first arises, upon the regularity of the course adopted by him, in submitting to the vote of the people, at one and the same time, propositions for the county to subscribe to the capital stock of three railroad companies. The mere fact that there was a submission of three several propositions at the same time to the vote of the people, if each proposition submitted in other respects met the requirements of the law, would not of itself, render invalid the proceedings under such submission. It may be as competent for the county judge to submit these questions to the vote of the people, to be decided at the same election, as to submit one question singly. But in order to render the vote of any validity, and to confer any authority by it upon the county judge, all the requisites of the statute must be complied with, in reference to each question or proposition submitted to the vote. No vote of the people, adopting a proposition submitted to them, involving the borrowing or expenditure of money, (as for instance, a subscription to the capital stock of a railroad company, and the issuing of county bonds in payment of the same), is of any effect, unless there has accompanied the question submitted, a provision for levying a tax to pay the said subscription or money borrowed; and unless

the vote of the people adopt the tax also. Section 116. While the county judge, in the proceedings which are under examination, submitted to the vote of the people, the question whether the county should subscribe one hundred and fifty thousand dollars to the capital stock of each of said railroad companies; and while he directed the vote upon the question of each subscription to be taken separately, there was no separate provision for a vote to levy a tax for the payment of each subscription, nor of the bonds which it was sought to authorize the county judge to issue, in fulfillment of the same.

We do not think it is requisite under the law, that there should be a distinct provision for levying the tax, in the proposition submitted to the people, to be voted for separately from the question of subscribing the stock. But we are of opinion, that to render the vote adopting the proposition to subscribe stock in the name of the county of Lee, in either of said companies, of any effect, the propositions and each of them, must be accompanied by a provision for levying a tax to pay the subscription. It is not sufficient that a provision, general in its terms, and applying to the whole three questions submitted, accompanies the proposition, as in this instance, declaring that "an annual tax not exceeding one *per centum* on the county valuation shall be levied, to be applied to the liquidation of the principal and interest of said bonds." The law, according to the view that we have taken of its provisions, evidently contemplates distinctness and unity in each question or proposition submitted for adoption or rejection by a vote of the people. Each proposition submitted to such vote, should be complete in itself, and should contain every requisite prescribed by the statute, as necessary to give validity and effect to the borrowing or expenditure of money, the subscription of stock, or the issue of county bonds.

There is still another objection which we must regard as equally fatal to the validity of the proceedings, on which the authority claimed by the county judge in this instance, is based. Every proposition for the borrowing or expenditure of money by a county, and forthe levy of a tax to pay

the same, receives its vitality as a law, from the majority of the votes of the people cast in its favor. Such being the case, we think it is evidently the policy of the law, no less than its spirit and intention, that the vote of the people should be permitted to be cast for reagainst the propositions submitted, with no restraint upon the free expression of their choice. We have said that in our opinion, the law contemplates unity and distinctness in the question authorized to be submitted, in contradistinction to the uniting of several questions in the same proposition, or the incumbering of any proposition with conditions not required or not permitted by the statute. The proceedings coming under our notice in this cause, present a most forcible illustration of the wisdom of what we deem to have been the policy of the statute. The people were not called upon, nor were they permitted, to decide by their votes whether the county of Lee should borrow money for one purpose or object. No single question was submitted to their votes to be decided upon its own merits, or by the judgment of the people in its favor. Nor were three propositions submitted at once, to be voted upon and decided upon, either singly or in the aggregate. No question submitted was permitted to stand by itself, or to take effect upon the decision of the people in its favor. On the contrary, while it is contained in the proposition, that a majority of the votes cast in favor of the subscription to the stock of either company, should be considered its adoption by the people, it is also further contained and declared, "that the said subscription shall not be made to either of said companies, unless the vote shall be carried in favor of each and all of them."

We cannot regard this in any other view, than as an attempt to impose a condition upon the taking effect of the vote of the people adopting a proposition submitted to them, wholly unauthorized by the law. They were entitled to have the question of the county taking stock in either of these railroad companies, submitted to their decision, unincumbered by any such condition or proviso. To make the success of any one proposition depend upon the adoption of all, was to

take from the expression of the will of a majority of the people, that essential validity intended by the law to be imparted to it, where it declares that the question adopted by them shall have the force and effect of an act of the General Assembly. The county judge can neither add to, nor take from this validity by any proviso, condition, or restriction, sought to be imposed by him. The will of the people, expressed by the adoption of the proposition for the borrowing or expenditure of money by the county, is the law of the land. The force and effect thus imparted to their will, is intended to be given to that will freely expressed. The county judge can impose no condition upon its taking effect. If the majority of the votes of the people is in favor of the adoption of the proposition, why should it not be declared to be the law and carried into effect, as provided for and intended by the statute? On the other hand, why should the force and effect of law be given to the vote adopting any proposition, which has not rested solely on its own merits for the favor it has obtained at the hands of the people, but which may have been assisted to the votes it received, by other questions, with which it was so connected, as that it must stand or fall with them. The law, in our opinion, has provided for no such mode of submitting these questions to the vote of the people. The evils which might be permitted to grow up under such a system, are so obvious and apparent, that any extended discussion of the question by us, would be superflous. It may be sufficient to suggest, that if it were allowed, measures in themselves odious and oppressive, might by means of it, become fastened upon a county, which in no other way could have obtained the number of votes requisite to insure their adoption, but by being connected with some other proposition, which commended itself to the favor and suffrage of the people, by its inherent merits and popularity. They must be adopted or rejected together. After the same manner, a measure desirable and necessary to a people of a county, may when offered for their adoption, be rejected by their votes and fail to become a law, by reason of its connection with some other measure or meas-

ures unpopular or uncalled for. In either case, there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them, in despite of their wishes. It is sufficient for us to say, that the law, in our opinion, intended to provide for no such system of contradictions. A measure wise and salutary in itself, needs no adventitious assistance to recommend it to the suffrages of the people, or to insure its adoption by them. It may demand that its enactment into a law, shall be made to depend upon their sanction alone. A pernicious measure is not entitled to such assistance, and should be permitted to stand or fall by its own inherent merits or defects.

It is no sufficient argument herein, in support of the regularity or legality of the proceedings of the county judge, that the record exhibits the fact that each of the propositions submitted to the vote of the people, was adopted by a large majority. We do not undertake to say, that they might not each have been adopted separately, or in a separate proceeding unconnected with each other, or with any other question. But we cannot say, on the other hand, but that in such separate and independent proceeding, one or more might have been rejected by the vote of the people. The possibility is sufficient for us to base an argument upon, against the legality of the course adopted. We cannot draw any argument from the result as shown. It is upon this very result, that we would base our argument against the validity of the proceeding. They have been adopted by uniting upon each one, the votes of the separate friends of all. But why was it deemed advisable to unite them? Why not suffer each to be adopted or rejected by the people, in a separate and independent vote? Why, but because there might be fears that no one project would of itself, receive a sufficient number of votes, to insure its adoption by the people? and because by a combination of interests, it might be hoped to unite upon all the propositions, the votes of the separate friends of each? A mode of obtaining such a result, we may be permitted to say, which the law did not contemplate, and which to our minds, seems wholly unauthorized.

Our conviction of the correctness of these views, is strengthened by the consideration, that the constitution of the state provides in reference to acts of legislation by the General Assembly, that "every law shall embrace but one object, which shall be expressed in the title." Article 3, § 26. The purposes to be secured, as well as the evils to be remedied or avoided, by this provision, can hardly be the subject of controversy. It was intended to place a check upon a mode of legislation, by which measures wholly incongruous, in many instances, deleterious and objectionable, were passed into laws, by uniting them together in one bill, and thus securing the support and influence of the separate friends of each, to pass them all into a law—a practice so long pursued, that it had in some localities grown into a system, the evils of which have become barely less than historical. The constitutional restriction upon the legislation of the General Assembly, does not in its letter apply to the qualified legislation provided for by the statute in the case of the borrowing and the expenditure of money, or levying taxes to pay the same, by the county judge. We can well apprehend, however, how it may become requisite that the spirit of this provision of the fundamental law, should run through all the acts and measures of such inferior and subordinate authorities and tribunals, as may have committed to them, in even a qualified sense, the duties and responsibilities of legislation. The authority vested in the county judge, of submitting certain questions to the vote of the people of his county, which when adopted by them, are to have the force and effect of an act of the General Assembly, is derived entirely from the statute. The duties imposed upon him, and the several steps to be taken by him, throughout the whole of the proceedings, are plainly prescribed by the statute. He may determine whether the question may be submitted to the vote of the people, and the time when it shall be so submitted. But beyond this, it does not seem to us, that there is left to him any discretion in the premises. There is no provision for connecting two or more questions in one submission; for making the adoption of each one depend upon

the adoption of all; nor for imposing any condition whereby a proposition adopted by a majority of the votes, shall be prevented from becoming a law.

The authority exercised by the county judge, in the proceedings complained of in this suit, if they properly belong to him at all, can only be inferred from a construction of the statute, which we do not deem legitimate. We do not think that any such authority can be inferred from it. In the spirit of the prohibitory clause of the constitution, to which reference has been before made, we must hold, that he is to be confined in the submission of any question by him, to the vote of the people, to such as shall embrace only one object.

As the decree of the District Court denying the relief sought, and dismissing complainants' petition, must be reversed, for the reasons above set forth, we do not deem it expedient or necessary, at the present time, to enter into any examination of the other questions presented and discussed by the counsel. Their inherent importance, and the great interest felt in their decision by a large portion of the people of the state, admonish us of the patient study and deliberation with which their investigation must be attended; and we have deemed it proper to avoid rendering any judgment upon them, until they shall arise in some case where the decision is rendered necessary, in order to its final disposition. Another reason which has had its weight with us, is that it is understood that the questions raised have been passed upon and decided by the former members of this court, in the case of *The County of Dubuque* v. *The Dubuque and Pacific Railroad Company*. But as no written opinion has been filed in this court, and as we are uninformed as to the exact questions decided, as well as of the reasons upon which the decision was based, we have concluded to give no opinion upon them. As their decision is not necessary to the disposal of this cause, we have the more readily adopted this conclusion. The order and decree of the District Court in favor of defendant, sustaining the demurrer to complainants' peti-

tian, and dismissing the same, are reversed, and the cause remanded to said District Court, for further proceedings not inconsistent with this opinion.

SHAWG *v.* BRUCE.

Where on a trial of a cause in the District Court, appealed from a justice of the peace, it appeared from the justice's transcript, that the action was brought on account for ninety dollars, for medical services, and that the plaintiff filed his book of original accounts, and it also appeared that the original notice had been lost after the trial before the justice; and where the plaintiff offered in evidence his books of account, for the purpose of sustaining his action, to which the defendant objected, on the ground that there was no copy of the plaintiff's account or demand, to be found with the papers, which objection was overruled, and the evidence admitted; *Held*, That the evidence was properly admitted.

After appearance and trial before a justice of the peace, the original notice has served its office; and, on appeal, its sufficiency or character becomes immaterial.

The nature of the cause of action, and the amount claimed, must be entered on the justice's docket; and in the absence of written petition, these entries of the justice, are the proper evidence, on appeal, of what is claimed by the plaintiff.

Appeal from the Webster District Court.

THIS action was commenced before a justice of the peace; trial and judgment for plaintiff, from which defendant appealed. The justice's transcript shows, that the action was brought on account for ninety dollars, for medical services, and that plaintiff filed his book of original accounts. It also appears that the original notice was lost, after the trial before the justice. On the trial in the District Court, plaintiff offered his books of account, for the purpose of sustaining his action, to which defendant objected, for the reason that there was no copy of the plaintiff's account or demand to be found with the papers, which objection was overruled, verdict and judgment for plaintiff, and defendant appeals

Jas. D. Templin and *J. W. Woods*, for the appellant.

WRIGHT, C. J.—We see no good reason for disturbing this judgment. It is urged, that the original notice was not before the District Court, and that there was, therefore, nothing to show the remedy sought by plaintiff, or what was his cause of action. The answer to this is, that after appearance and trial, before the justice, such notice has served its office; and on appeal, its sufficiency or character becomes immaterial. It is to state the amount claimed, and the nature of the cause of action. These things must also be entered in the justice's docket, and in the absence of written petition, these entries of the justice, are the proper evidence of what is claimed by plaintiff. And though the original notice may have been lost or mislaid, plaintiff is not to fail in his action or appeal, if by the proper entry in the magistrate's transcript, it sufficiently appears what was the cause of action. In this case, it does appear from the justice's transcript, that the plaintiff claimed the sum of ninety dollars, for medical services, and filed his "book of accounts." No further or more specific statement appears to have been required by defendant, before the justice. On the contrary, the record discloses that a set-off and answer was filed. Under such circumstances, we think the testimony of plaintiff was properly received. Judgment affirmed.

BEBB *v.* PRESTON, Garnishee.

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Where a garnishee answers, first, denying generally, that he owes the person as whose debtor he has been garnished, or that he has property, rights, or credits of such person in his possession; and secondly, by a special answer, shows that he does, in fact, hold property, &c., of such person in his possession, the plaintiff may take issue on the general answer, and is not obliged to put specific questions to explain the matters stated in the special answer.

The special answer is permitted, for the benefit of the garnishee, that he may not be obliged to assume the responsibility of categorical answers to the general questions.

Under section 1759 of the Code, the pleadings in a cause may be amended, after the case has been before the Supreme Court, and returned to the District Court.

Where a garnishee answered, denying that he was indebted to the original defendants, or that he had in his possession any property, rights or credits, belonging to them; and also set forth that he held in his hands the proceeds of certain property assigned to him for the benefit of certain creditors named in the agreement between the defendants and the garnishee; and where the plaintiff asked leave to file an amended replication, which alleged: "1. That the assignment under which the garnishee acted, embraced all the property of the defendants not exempt from execution; that it was made in contemplation of insolvency; that it was made with intent to hinder and delay the creditors of the defendants; and that it was fraudulent and void as against such creditors. 2. That the said garnishee is indebted to the said defendants, or one of them; that he owes them, or one of them, money or property not yet due; and that he has in his possession or control, property, rights, credits, and effects, of the said defendants, or one of them," which leave was refused; *Held*, That the plaintiff had the right to show that the assignment was void, under chapter 62 of the Code; and that the court should have allowed the amended replication to be filed.

Where in a proceeding of garnishment, the garnishee claimed to hold certain property and effects, by virtue of an assignment for the benefit of certain creditors, and the plaintiff for the purpose of showing that the assignment was void, offered evidence to show that there were creditors not provided for in the assignment, and that the assignment embraced substantially all the property of the assignors, and was made in contemplation of insolvency, which evidence was rejected; *Held*, That the evidence was admissible.

Appeal from the Linn District Court.

THIS cause was before this court at the December term, A.D. 1855, when the judgment below was reversed, and will be found fully reported in 1 Iowa, 460. On the return of the cause to the District Court, with a *procedendo*, the plaintiff asked leave to file an amended replication to the answer of the garnishee, which replication reads as follows:

"And now comes the said plaintiff, and for amended replication to the answer of Isaac M. Preston, garnishee, says:

"1. That the assignment under which the said garnishee acted as the trustee of Annis Hathaway, and which assignment is dated the 12th day of January, A.D. 1854, a copy of which is made a part of the answer of said garnishee, embraces all the property and effects of the said Hathaway, not exempt from execution; that the same was made in contemplation of insolvency, and was made with intent to hinder and delay creditors of the said Hathaway, and said

Hathaway & Parkhurst; and that the same is fraudulent in law and in fact as against the said creditors.

"2. And for other and further replication to the said answer, the said plaintiff says, that the said defendant is indebted to the said Hathaway, and the said Hathaway & Parkhurst; that he owes them, or one of them, money or property which is not yet due; and that the said defendant has in his possession, or under his control, property, rights, credits, and effects of the said Hathaway, or Hathaway & Parkhurst; and the said plaintiff denies the answer, and each allegation thereof, to the first interrogatory answered."

The court refused to allow the amended replication to be filed, to which refusal, the plaintiff excepted. The parties then proceeded to trial; and the plaintiff, for the purpose of showing that Hathaway & Parkhurst were indebted to creditors other than those mentioned in the assignment, previously to the date thereof, offered to introduce in evidence, two promissory notes, one for $886.34, to the plaintiff, Bebb, and one for $1,354.12, to Bowen & McNamee, and a copy of the judgment in favor of Bebb, on the foregoing note. This being objected to, the court ruled them inadmissible. The plaintiff then offered McIntosh as a witness, to prove that the property mentioned in the assignment to Preston, was all the property of said H. & P., and of said H. at the time of making the assignment. On the motion of the garnishee, this testimony was rejected. To all this the plaintiff excepted, and now assigns for error, the rejection of the said testimony, and the refusal to permit the filing of the amended replication.

W. Penn. Clarke, for the appellant.

1. Upon the first error assigned, I shall expend but few words. The statute expressly provides, that the court may allow material amendments *at any stage* of the proceedings, upon such terms, and subject to such rules, as it may prescribe. Code, § 1756. The court cannot deny the right to amend, but it may impose a penalty. The judgment having been reversed, the case stood as though there had been no

trial—as in fact there was none. It was competent, then, for the plaintiff to amend his pleadings, and it was error in the court to deny him that right.

2. This is a contest between a creditor and the garnishee of his debtor. The statute provides that when the answer of the garnishee is made at the District Court, the plaintiff may controvert any facts contained therein and specified by him, and issue being thereupon joined, may be tried in the usual manner. Code, § 268. What does this mean? What are the facts referred to by the statute? The statute gives the questions which may be propounded to garnishees; and in this case the garnishee answers the first two of those questions in the negative, stating that he is not indebted to the defendants in the principal case, and that he has in his possession, or under his control, no property, rights, or credits of said defendants. Are these, or either of them, the facts contained in the answer, and specified by the garnishee, which the plaintiff may contest, and on which there may be a trial? We think so, and for the plain and simple reason, *that they may be the only facts stated in the answer.* If the plaintiff stops at the interrogatories laid down in the statute, there *can be no other facts* in the answer, for the plaintiff to controvert. And treating the answer in this case, as if no other interrogatories had been propounded to the garnishee, and issue had been taken on his denial of indebtedness, or having property, rights, or credits of the defendant in the principal case, in his possession, or under his control, let us see what evidence would have been admissible, on the part of the plaintiff, to sustain the issue? Under the issue of property, &c., or no property, &c., in the hands of the garnishee, we insist that the plaintiff might have shown the following facts:

1. That Hathaway & Parkhurst, or Hathaway himself was heavily in debt, and in embarrassed circumstances;

2. That being pressed for payment, and threatened with litigation, by certain of his creditors, Hathaway made an agreement with the attorney of said creditors, by which he delivered to said attorney all of his stock of goods, wares,

and merchandise, with authority to sell the same on credit, pay certain creditors named in the agreement, and to pay the surplus proceeds of the sale to said Hathaway.

3. That the goods specified in the said agreement, embraced substantially all the property of Hathaway, and of Hathaway & Parkhurst, not exempt from execution; and that there were other creditors of said firm, and of said Hathaway, not named in the agreement, and for whose payment no provision had been made.

4. That the garnishee, at the time he was garnished, held in his hands, and under his control, the sum of $1,176.15 of the proceeds of the property received and held under the said agreement.

These facts being legitimate to the issue, if sustained by competent testimony, would give rise to a question of law, viz: the character of the agreement, and its sufficiency to pass the title to the property to Preston, the garnishee. To the consideration of this question of law, we shall come hereafter.

In this case, however, the plaintiff, not content with propounding the questions fixed by the statute, exercised his right, and puts other questions to the garnishee; and in answer to these interrogatories, two of the facts above suggested, are drawn out of the garnishee, viz: the agreement and the circumstances upon which it was made, and that the garnishee at the time of the service of the writ of attachment upon him, held $1,176.15 of the funds arising from the property conveyed by the agreement. Thus two of the facts necessary to be established by the plaintiff, were admitted by the garnishee, and no proof was required as to them. Two other facts, then, were left for the plaintiff to establish by testimony, viz: the indebtedness and embarrassment of Hathaway, and that the property delivered to Preston under the agreement, embraced substantially all the property of Parkhurst, leaving other creditors unprovided for. To establish these facts, the plaintiff offered two notes and a judgment against the firm of Hathaway & Parkhurst, and McIntosh, to prove that there was no property belonging

either to Hathaway individually, or to the firm of Hathaway & Parkhurst, other than that mentioned in the agreement. This evidence the court refused to allow to go to the jury. This was error, and so palpably so, under the view I take of the case, as to require neither argument nor illustration. If the testimony was competent, as will not be questioned, and relevant to the issue, in any degree, the court improperly withheld it from the jury. And had this testimony been admitted, it would have made out and established the four facts above suggested, and which, in my judgment, it was necessary for the plaintiff to prove, in order to entitle him to a judgment against the garnishee.

It may be well here to inquire, why it was necessary for the plaintiff to establish the two facts last mentioned? I answer, that these two facts bear upon the character of the instrument by which the property was delivered to Preston, and are necessary in order to determine its legal sufficiency to pass the title of the property to him. If the instrument only conveyed the property to Preston, to secure certain creditors, leaving other property out of which other creditors might be secured or paid, then the instrument was valid, and transferred the property. If, on the other hand, the instrument embraced all the property of Hathaway, and of the firm of Hathaway & Parkhurst, and instead of being a conveyance to secure certain creditors, amounted to an absolute assignment of the property for the benefit of certain creditors, to the exclusion of others, then the conveyance or agreement was invalid, and could pass no title to the property. The agreement might be valid on its face, yet rendered invalid by extrinsic circumstances. Unimpeached, the courts would presume in its favor; when impeached, that presumption would cease to exist. With the view of impeaching it, the evidence rejected by the court was offered. That evidence, if admitted, would have shown that the instrument, though purporting to be an agreement, was in fact and in law, an assignment of all the property of Hathaway, for the benefit of some of his creditors, to the exclusion of others. Without that evidence, no such question could be

raised, for the court could neither presume that there were other creditors, or that there was no other property. For these reasons, it was necessary to show, not only that there were other creditors, but that there was no other property out of which their claims could be realized. And on the broad questions, whether the garnishee had or had not, property, rights, and credits, belonging to Hathaway, in his possession or under his control, there can be no doubt, it seems to me, that the testimony offered was admissible.

With this testimony before the jury, and the four facts above stated, thus established, the legal question arose—what is the legal character of the agreement between Hathaway and Preston, and was it sufficient to vest the title to the property in the latter? If the agreement was valid, it passed the property to Preston, and he could truly say, that he had no property, rights, or credits of Hathaway, in his possession or under his control. If the instrument was *void*, it passed no title—the title remained unchanged in Hathaway—Preston held as trustee for Hathaway only, and not as trustee for Hathaway's preferred creditors—and the property, or the avails of it, in Preston's hands, was subject to attachment. The garnishee places his defence on this instrument, and claims to hold under and by virtue of that only. It is the foundation stone of his claim to exemption from liability. If it stands, his answer is true—he has no property, rights, or credits of Hathaway. If it falls, his answer is legally untrue, and he has property, rights, and credits of Hathaway in his possession or under his control; for it is too well settled to admit of controversy, that a void deed conveys no title. What then, is the legal character of this instrument? We say that it is an assignment to Preston, in trust, for the benefit of certain creditors. The instrument shows on its face that it is such. It recites that Hathaway is indebted to certain persons, naming them, and the amount of their respective claims, and that they are about to commence legal proceedings to collect the same, and that the said Hathaway, for the purpose of paying said debts, *and for the consideration*

and purposes aforesaid, delivers to said Isaac M. Preston, attorney for claimants, &c., and after providing the manner of the sale, and for the payment of expenses, and the payment of the debts mentioned therein, requires the said Preston, to account for and to the said Hathaway, for the residue of the purchase money received for said goods upon the sale made as aforesaid. What is this, but the language of an assignment, and what stronger could be employed evidencing an intent to make an assignment? The consideration expressed, and the requirement to account for the surplus, are the very ear-marks of such an instrument. And the acts of Preston under the instrument, as detailed in his answer in this case, shows that it was so regarded and treated by both parties. No particular form of words is necessary in making an assignment, and any instrument by which property is vested in a particular person, for certain expressed purposes, is in legal contemplation, an assignment.

The instrument being an assignment for the benefit of creditors, the next question that presents itself is, was it a general assignment of property by an insolvent, or in contemplation of insolvency? and does it come within the purview of our statute? Section 977 of the Code, provides, that no *general* assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims. Code, 154. The word *general* used in the statute, applies to the property of the assignor, and includes *substantially*, all a man's property. *Mussey* v. *Baldwin*, 3 Liv. Law Mag. 24. Now, upon its face, the instrument does not purport to be *general*, or to convey all the property, nor does it purport to exclude any of the creditors of the assignor. Neither is it expressed in the instrument, that the assignor is insolvent, or that he contemplates insolvency. Should it show these things, or are they extrinsic facts, which may be established by *other testimony?* If it must appear upon the face of the instrument, that the assignment embraces all the

property of the assignor; that it is made under the pressure of threatened insolvency; and that all the creditors are provided for, in order to render it a general assignment within the meaning of the statute, then the power to evade the law is placed within the hands of the assignor himself, and the statute works a positive injury to creditors. If it cannot be shown by evidence *dehors* the instrument, that the assignment, while purporting to be *partial*, was in fact *general*, embracing all the property of the assignor; that other creditors are unprovided for, and that it was made by an insolvent person, then no assignment, however partial and unjust, can be successfully assailed. Such certainly, could not have been the intention of the law making power.

But this question has recently been decided by the Supreme Court of Vermont. In that state, the statute provides, that "all general assignments hereafter made by debtors for the benefit of creditors, shall be null and void as against the creditors of such debtors." In *Mussey* v. *Baldwin*, above cited, the question was, whether an assignment was *partial* or *general*, under the above statute? And the court held, that it was "competent for such creditors as choose not to come in under the assignment, always to raise the question, whether an assignment claiming to be *partial*, is not, in fact, *general*, and *to give evidence to show such fact, which under proper instructions, is to be submitted to the jury.*" Now, here, the assignment purports neither to be *partial* nor *general*, either as respects the property or the creditors of the assignor. Whether it is one or the other, is a question of *fact*, to be established by testimony, and its validity depends entirely upon that fact. If proved to be partial, as respects the property, it is valid; if shown to be general in that respect, it is void under the statute, for the reason that it does not purport to be made for the benefit of all the creditors of the assignor. Under the above decision, which I regard as conclusive, we had the right to establish that fact, or rather the right to attempt to establish it, and offered so to do. This right was refused by the court, and herein was the second error of the court.

I. M. Preston, pro se.

The answer of the garnishee denies, that he has money, rights, or credits, &c., except as stated in the answer, and then makes a full statement of the facts relating to the property in his hands. Now, upon this answer, I contend that it is a question of law for the court to determine, whether said property is so held as to be liable to plaintiff's attachment, unless the answer is controverted. In this case, the answer is admitted to be true. But plaintiff contends that the answer itself shows the property to be liable. If the plaintiff claims that he is entitled to recover upon the showing in the answer, then it is a question of law for the court, and not a question of fact for the jury.

Upon the settlement with Hathaway, on the 27th of January, 1854, everything relating to the goods were then settled, and if any trust ever did exist, it was then executed, and became absolute. The evidence rejected by the court below, was irrelevant and immaterial, and did not tend to controvert any part of defendant's answer, upon the issue joined; and if said evidence had been admitted, it could not have changed the result.

WOODWARD, J.—We have expressed the opinion, that the transaction between Hathaway and Preston, was in effect an *assignment* for the benefit of creditors. The questions of the case, turn on this. It is unquestionably clear as a proposition of law, that the plaintiff may show that this assignment is void, under chapter 62 of the Code, as being general, and made by an insolvent, or in contemplation of insolvency. In order to do this, he must show that there were other creditors not provided for, and that the assignment contained substantially all the property of the assignor. The cause does not turn at all upon the property being that of Hathaway only. The property of one partner is liable for partnership debts, and this may be such a case. But the question here seems to be, whether he may do it upon these questions and answers. It does not appear to us, upon what grounds the court below decided; but we assume that it was that

some other and more specific question pointing to the particular matter, should be put to the garnishee. Two considerations are to be regarded; one is, that the garnishee is to take care of his answer, and place himself within the law. It has been a rule pertaining to these proceedings (and may be still), that if the garnishee does not clear himself, but leaves any matter doubtful, when the requisite knowledge is within his proper reach, the answer shall be taken against him. The other consideration is this, suppose the question to be put, whether there are other creditors and other property, and the garnishee to answer, that he *does not know*. Is the plaintiff to be stopped by this? This garnishee answers first, generally denying that he owes defendant, and that he has property, rights, or credits of his, in his possession; and secondly, by a special answer, showing how he does in fact, hold some property, &c. Now, is the plaintiff *obliged* to put *specific* questions to draw out answers to the above named matters, before he can take issue, or may he take issue on the *general* answer. After some doubt and consideration, we are of opinion, that he may take issue on the general answer. As we have intimated before, if the garnishee should answer that he *does not know*, this could not stop the plaintiff; and, further, the special answer is permitted for the benefit of the garnishee, that he may not be obliged to assume the responsibility of a categorical answer to the general question, but may explain the circumstances in which he stands. This proceeding is not intended to be a burthen upon a garnishee. His rights are to be protected. He is to be considered as an innocent and indifferent party, although it is well enough known, that sometimes they are not such. Such they are, in contemplation of law, until the contrary be shown. Therefore, we might not hold him to so technically correct an answer, as to exclude every presumption; but we feel constrained to say, that as the plaintiff may controvert his answer, and as the garnishee does not on his special answer, present any tangible matter upon which to raise the issue of fact or law, the plaintiff must be permitted to make that issue on the general answer. The proposed amendment consists of two

parts or propositions. The second is, first, in natural order, being a general denial of the answer, by alleging that the garnishee is indebted, &c., while the first contains a specification of how, or by what means, he is indebted to, or has property of the defendant in his hands; so that we are inclined to view them as constituting but one allegation—one issue. If the plaintiff had simply averred that the garnishee was indebted, without pointing out how or wherein, there might have been a question of its sufficiency.

The remaining question, concerning the amendment, is, whether it could be made at that stage of the case—that is, after the cause had been taken to the Supreme Court? In this fact, probably consisted the reason of the refusal to permit the amendment, upon the ground that the cause must be tried anew upon the same pleadings. The 1759th section of the Code is: "The court may allow material amendments at any stage of the proceedings, upon such terms, and subject to such rules as it may prescribe." We should not be inclined to lay great emphasis upon the words "at any stage of the proceedings," for there is much reason in the argument, that they were intended to apply to the ordinary course of an action, before it comes to an appellate court. But taking into view this language, with the general tone of the Code, with reference to coming to the substance and merits of a cause, and considering that there is no really strong reason against it, apart from the question of costs, and then remembering that this matter of costs is *entirely* within the discretion of the court, we believe it permissible. The practice, even now obtains in substance. This court sometimes sends a cause back to the District Court, with leave to amend. We will hold that the court should have allowed the amendment, believing that the practice will tend to the ultimate attainment of truth and justice.

Another error assigned, is the rejection of the evidence offered; that is, the notes, the judgment, and the witness, McIntosh. The foregoing remarks show, that in the opinion of this court, they should have been received, at least with the amendment, if not under the former pleading.

The garnishee makes the question in his argument, whether he can be charged after the settlement which he alleges that he made with Hathaway. This is not within our reach. The judgment of the District Court is reversed, and a writ of *procedendo* is awarded.

GOVER *v.* DILL.

Before a party can avail himself in the appellate court, of an error in the instructions of the District Court, it must appear from the record, that he excepted at the time the instructions were given.

Sections 1696 and 1697 of the Code, contemplate that the person seduced, shall be unmarried at the time of such seduction.

If an instruction is inapplicable, however correct it may be in the abstract, it is not error to refuse it.

Where in an action for seduction, the petition alleged a promise of marriage, for the purpose of specifying the manner in which the defendant practiced his flattery and deception, and it did not appear from the record that the plaintiff claimed damages for the breach of this promise; and where the defendant asked the court to instruct the jury as follows: "1. That this suit is brought for seduction only, and not for breach of promise of marriage; and that such promise, if any, cannot be considered in reference to the measure of damage. 2. That if any promise of marriage was made by the defendant to plaintiff, she has a right to bring her action for a breach (if any) of such promise; and the same cannot be taken into consideration by the jury, in measuring the damages in this case," which instructions were refused; *Held*, That the instructions were inapplicable, and properly refused.

Where in an action for seduction, the petition alleged that the plaintiff, at the time of the seduction, was an unmarried female, which was not denied by the answer; and where the defendant asked the court to instruct the jury as follows: "That to sustain this action, the plaintiff must prove that she was unmarried at the time of the alleged seduction," which instruction was refused; *Held*, That the instruction, although correct, was properly refused.

Appeal from the Jefferson District Court.

SEDUCTION.—On the trial, the defendant asked various instructions, which were refused, as is shown by the bill of exceptions, because of their inapplicability, and because the same had been given in the instructions in chief. The ma-

terial facts sufficiently appear in the opinion of the court. The defendant appeals.

Slagle & Acheson, for the appellant.

Clinton & Baldwin, for the appellee.

WRIGHT, C. J.—Three errors are urged, and relied upon in this case:

First. That the court erred in the instructions in chief, given to the jury.

Second. The refusing the instructions asked by defendant.

Third. In overruling defendant's motion in arrest, and for a new trial.

Various objections are urged to the instructions in chief, but however well founded, we cannot consider them, for the reason that no objection appears to have been made by defendant, at the time they were given to the jury. Before a party can avail himself in this court, of an error in the instructions of the court below, he should except at the time, and have his exceptions shown by the record. This has been too frequently so decided in this court, to be longer treated as an open question.

Under the second assignment, it is claimed, that the court erred in refusing the following instructions asked by defendant, and to which refusal he at the time excepted.

First. That this suit is brought for seduction only, and not for breach of promise of marriage. And that such promise, if any, cannot be considered in reference to the measure of damages.

Second. That if any promise of marriage was made by defendant, to plaintiff, she has a right to bring her action for a breach (if any) of such promise, and the same cannot be taken into consideration by the jury, in measuring the damages in this case.

Third. That to sustain this action, the plaintiff must have proved to the jury, that she was unmarried, at the time of the alleged seduction.

Our Code gives the unmarried female, the right to prosecute an action for her own seduction, and to recover the damages that may be assessed in her favor. If such female shall be a minor, however, the father, mother, or guardian, may bring the suit, and this right of action they have, without reference to the question, whether she is living with or in their service, and though there be no loss of service; and the damages so recovered, enure to the sole benefit of the said ward or minor. Sections 1696 and 1697. Whether, in either instance, the plaintiff may, under our law, unite in the same action a claim for seduction and for breach of promise of marriage, we do not propose at this time to determine. Nor is it necessary for us now to decide, whether if the seduction was accomplished by promise of marriage, such promise could be considered in determining the measure of damages claimed for such seduction. We think the case can be decided without entering upon the consideration of these questions.

It appears that some of the defendant's instructions were refused, because they were inapplicable, while some were refused, because others were substituted, or as we understand the record, because they had been substantially given in the instructions in chief.

We are unable to see the applicability of the first and second instruction referred to above. No part of the record developes the fact, that plaintiff claimed damages by reason of any breach of a marriage contract. The original petition claimed of defendant the sum of five thousand dollars, and for cause of such claim set forth that he did "by flattery and deception, seduce and debauch, and carnally know the said plaintiff, then an unmarried female, of previous chaste character." To this petition there was a demurrer, for the reason that it did not state "in what the flattery and deception, charged consisted," or "what false promises were made by defendant." To this demurrer the plaintiff submitted, and amended her petition, stating therein, among other things, the following: that at the time mentioned in the original petition, and for a long time previous thereto, the de-

fendant had been paying particular attention to her, and had pretended to her that she had his best affections; that he pretended to be your petitioner's near friend, and professed heartily to love her, and indeed went so far as to promise to marry her, and promised and said he would be faithful to his promise to marry your petitioner, if she would allow him to have connection with her. But your petitioner now says, that said professions, pretences, and promises, were all false and deceitful, and that defendant's real object was to impose upon her, and ruin her character for chastity and virtue." And it also further appears, that testimony was introduced tending to prove the seduction, and also a promise of marriage. Beyond this, there is nothing to show that the plaintiff pretended to claim damages, by reason of any breach of a marriage contract. The petition claims nothing of the kind. The promise to marry is set forth, evidently for the purpose of specifying the manner in which defendant had practiced his flattery and deception, and the proof does not appear to have been made for any other purpose. To entitle the plaintiff to recover, it was not sufficient that she should show alone, that defendant had carnally known her, or that there was merely an illicit intercourse between them; but she was required to show, that the defendant accomplished his purpose by some promise or artifice, or that she was persuaded to surrender herself to his embraces, by his flattery or deception. There may be, between man and woman, a criminal connection, and yet he not be guilty of seduction. If she, without being deceived by him, or without any false promises, deceit, or artifice, on his part, voluntarily submits to the connection, he is not liable to this action. And in view of this requirement, it was, as we suppose, that plaintiff amended her petition, so as to show how, and by what manner, defendant did succeed in accomplishing his purposes. The breach of the promise of marriage, is not set forth as the gravamen of the action, as a cause of her claim; but as one of the means used to accomplish that injury of which she does complain, and for which alone, she asks damages. Under such circumstances, we cannot suppose

that proof was made to show her damages for anything else than the seduction, or that she was allowed to ask damages for anything else. If it appeared, that she claimed before the jury, damages, resulting from a breach of such promise, or that proof was admitted for that purpose, then the instructions asked, might have been applicable. But in the absence of any such showing, we think the court below might well refuse them, as not being applicable. We would not, and do not say, that it would have been erroneous to have given the instructions. But if an instruction is ever so correct, in the abstract, it is not error to refuse it, if not applicable.

To illustrate the view here taken with a little positive particularity, let us suppose the defendant had asked the court to instruct the jury, that the plaintiff could not recover in this action, or have her damages enhanced, because of any slanderous words spoken by him touching her character for chastity, and such instruction had been refused, as being inapplicable. Could it be claimed with reason, that the court erred in such refusal, because the instruction, abstractly considered, was correct, and should therefore have been given? We think not. We are aware that it is frequently the case, that an instruction becomes applicable from the manner in which a case may be conducted, when in fact, its applicability is not apparent from the record itself. In such cases, it is the duty of counsel (especially when an instruction is refused as being inapplicable), to have embodied in the bill of exceptions, such facts as tend to show their right to the instruction. In this case, suppose it to be true, that counsel for plaintiff claimed in argument to the jury, that the breach of the promise to marry, must, and should, be taken into consideration by them, in estimating her damages. If this was shown, then the instructions asked would have been pertinent. As it is, however, there is nothing in the record before us, to develop this pertinency, and we cannot say that the court, in the exercise of a sound discretion, erred in in refusing them. We have already said that a court is not bound to give an irrelevant instruction, though it may be correct, abstractly considered. And we may add, that it is

the duty of the court to confine the instructions, as far as possible, to the law arising strictly in the particular case, and not to incumber the record, and confuse the jury, by giving every instruction which counsel in their commendable zeal and care, may ask. In this instance, we think there would have been no error in giving the instructions; nor do we think, under the circumstances, that it was error to refuse them.

We next come to the consideration of the third instruction above set forth. We entertain no doubt, but that sections 1696 and 1697 of the Code, contemplate that the person seduced shall be unmarried at the time of such seduction. The object of these sections is to give the right of action to the party injured, or the damages to her, instead of leaving the right alone in the parent or guardian. Formerly, we know, to the parent was given the right to sue, based upon the loss of service of the child or ward. And hence the particularity required in such actions, in showing that the daughter or ward was living with, or in the service of, the party suing. But it was not designed by the Code, to give a right of action to the female in her own name (or by guardian or parent, if under age), unless she was unmarried at the time the grievances complained of, were committed. Entertaining these views, we have no hesitation in saying, that the instructions asked on this subject by defendant, were correct, and should have been given, unless there is something in the record that shows good reason for its refusal.

The plaintiff in her petition alleges, that at the *time* of her seduction, she was an unmarried female, of previous chaste character. This was a material affirmative allegation, as much so as the allegation that she was seduced by defendant; and being such, it was the duty of the defendant in his answer, to specifically, either admit or deny it, or state some sufficient reason for not so doing. If he failed to do this, the allegation is, under the Code, to be taken as true. We find in the answer nothing of the kind. He denies the seduction, but nowhere takes issue upon the allegation contained in the petition, that plaintiff was at the time unmarried. This

being the case, it was unnecessary for her to prove that she, at the time, was a *feme sole;* for that which is admitted, needs no proof. For this reason, then, we think the court might properly refuse to instruct the jury, that she must *prove* she was unmarried at the time of the seduction.

But, again, we are led to believe that the refusal of this instruction, did in no manner prejudice the defendant's rights. The instructions in chief, which are copied in this record, are very full, and with great particularity refer to many, if not all, the positions assumed on either side of the prosecution and defence of the case. The jury are told that plaintiff must satisfy them, before she can recover, that she is an unmarried female; that her previous character is presumed to have been good; that this presumption will warrant them in so finding, unless the defendant had satisfied them that she was not virtuous, but that she had previously prostituted herself to the embraces of other men; and if the defendant had so satisfied them, their verdict was to be for defendant. And again, the jury are told, "if the plaintiff has satisfied you that she is an unmarried female, and that her seduction was accomplished by the defendant, and that defendant has failed to satisfy you that she was unchaste, and had previously lost her virginity, then you will find for plaintiff." And still further, the jury are told, that "it is admitted by counsel for plaintiff, however the law may be, that in this case they will, for the purposes of this trial, concede, that the person seduced must have been previously of chaste character—that she yet preserved that priceless jewel that is the peculiar badge of the virtuous *unmarried female.*" And yet, notwithstanding the apparent completeness of these instructions, there is nothing to indicate that the fact of the plaintiff's being unmarried, at the time of the alleged seduction, was controverted or formed any part of the defence. Giving to the language above quoted, its legitimate purport, it can mean nothing else, than that this was conceded, and the jury must have so believed, before they could have found in plaintiff's favor.

The only remaining assignment of error, relates to the

overruling of the motions for a new trial, and an arrest of judgment. As these motions were based upon the above supposed errors in the instructions and refusals to instruct, it becomes unnecessary to further examine them.

Judgment affirmed.

McKinney v. Hartman.

In the appellate court, the presumption is, that the ruling of the court below was correct.

It is the duty of the party alleging error, to show it affirmatively.

Where there is nothing in the record to show the applicability of testimony offered and rejected, the Supreme Court cannot presume a state of case to make error.

Appeal from the Davis District Court.

This cause was brought into the District Court by writ of error, to correct an alleged erroneous decision of a justice of the peace. From the bill of exceptions it appears, that before the justice, the defendant offered in evidence certain books of account, which were objected to, and the objection sustained, which ruling was affirmed by the District Court. Defendant appeals, and assigns for error the judgment of the court below, affirming the decision of the justice.

M. H. Jones, for the appellant.

Palmer & Trimble and *Knapp & Caldwell*, for the appellee.

Wright, C. J.—There is nothing in the record to show what was the defendant's defence to plaintiff's action. Whether he pleaded payment, or set-off, or in what way the charge in the books of account offered in evidence, were applicable to the cause of action or defence, does not appear. Under such circumstances, it is impossible for us to know

whether the justice did or did not err, in rejecting said books. For aught that appears, there was no foundation in the pleadings to warrant the testimony, and we cannot presume a state of case to make error. The presumption is, that the ruling was correct, and it is for the party alleging error, to show it affirmatively. This has been too frequently settled to be now questioned.

Judgment affirmed.

YOST *v.* DEVAULT.

No subsequent adoption of real estate as a homestead, by a party who has agreed to sell and convey the same, can affect the validity of the undertaking, or release the party from his obligation.

Where in an action to enforce the specific performance of a contract to convey real estate, the respondent pleaded, among other pleas, the following. "That it is impossible for him to convey the premises described in the complainant's petition, because the said premises *are* held by him (he being the head of a family, and having a wife living), as a homestead; that his wife refuses to execute a deed to the premises; that respondent *now* claims the same as a homestead; and that the wife of respondent, has filed her claim to the said premises as a homestead, in the recorder's office of Polk county. And having answered, he asks judgment for costs," to which plea, the complainant filed a demurrer, and also a replication in denial, which demurrer was overruled, and the cause dismissed; 1. *Held*, That the plea was insufficient, for the reason that it contained no averment, that the property named in the bond, was the homestead *at the time* the bond was executed; 2. That the replication raised an issue of fact which should have been heard; and that the order dismissing the suit was erroneous.

Appeal from the Polk District Court.

BILL in chancery, seeking to enforce specific performance of a contract for the conveyance of real estate. Respondent in bar of plaintiff's right to recover, sets up the following, among other defences. He "avers and alleges, that is impossible for him to convey the premises described in plaintiff's petition, because the said premises *are* held by

him (he being the head of a family, and having a wife living), as a homestead; that his wife refuses to execute a deed to the premises aforesaid; and that defendant *now* claims the same as a homestead; that the wife of defendant has filed her claim as a homestead to the said premises, in the recorder's office of Polk county, and having answered, asks judgment for costs." To this portion of the defence, complainant filed a demurrer, and also a replication in denial. The demurrer was overruled, and the cause dismissed. Plaintiff appeals.

Jewett & Hall, for the appellant.

C. Bates, for the appellee.

WRIGHT, C. J.—The order dismissing the suit was clearly erroneous. The replication denied the matters contained in the plea, and an issue of fact was thus formed which should have been heard. But we also think that the court erred in overruling the demurrer. The Code provides that a conveyance of the homestead, is of no validity unless the husband and wife concur in, and sign the same, and this homestead is required to embrace *the house used as a home.* Secs. 1247, 1250. Assuming for the purpose of this case, that a bond by the husband, for the conveyance of the homestead, upon certain conditions, could not be enforced, if resisted, on the ground, that it included or contemplated the disposition of such homestead, still this plea makes no such defence. It contains no averment that the property named in the bond, was the homestead *at the time* it was executed. For anything that is shown by the pleadings, this property did not become the homestead, until long after this contract was made. If not the homestead at the time of the agreement to convey, no subsequent adoption of it as such, could affect the validity of the respondent's undertaking, or release him from his obligation. Without examining the other errors assigned, we conclude that for those referred to, the judgment must be reversed.

Cox v. Graham.

A defendant cannot have a suit before a justice of the peace, dismissed, on the ground that he has filed an answer, which raises the question of title to real estate.

The answer or plea of the defendant, is not the test of the jurisdiction of the justice.

Should it be made to appear on the trial, that the title to real estate is involved, that fact may operate to transfer the cause to the District Court, but not to dismiss the case.

Where in an action on a promissory note, commenced before a justice of the peace, the defendant answered under oath, averring that the note was given in consideration of an interest which the plaintiff fraudulently professed to have, in and to certain town lots therein mentioned: that plaintiff made a quit-claim deed therefor: that the representations of plaintiff were false and fraudulent: that he had no title; and that the consideration of the note had therefore failed, to which the plaintiff replied; and where the defendant then moved to dismiss the cause, for the reason that the title to real estate was involved, which motion being overruled, the defendant withdrew any further appearance, and judgment was rendered against him for the amount of the note and interest; and where the cause was taken to the District Court by writ of error, where the judgment of the justice was affirmed; and where the transcript from the District Court, after stating the names of the parties, and the nature of the case, contained this entry: "Judgment below affirmed;" *Held*, 1. That the justice did not err in overruling the motion to dismiss the cause; 2. That the defendant by withdrawing from the case, after his motion to dismiss was overruled, virtually withdrew his answer, and that there was no error in rendering judgment against him; 3. That although the judgment rendered in the District Court, is deficient in form, it neither increased or diminished the liability of the defendant, and is a defect of which he cannot complain.

Appeal from the Lee District Court.

This action was commenced before a justice of the peace, to recover an amount claimed to be due on a promissory note. Defendant answered under oath, setting up that said note was given in consideration of an interest which the plaintiff fraudulently professed to have, in and to certain town lots therein mentioned; that plaintiff made a quit-claim deed therefor; that the representations of plaintiff were false and fraudulent; that he had no title; and that the consideration

had therefore failed. This answer was under oath, and called for a sworn reply. The docket of the justice contains the following entry; "defendant filed a written plea, which the plaintiff answered." The defendant then moved to *dismiss* the case, for want of jurisdiction, for the reason that the title to real estate was involved, which was overruled; and thereupon he withdrew any further appearance. Judgment was then rendered in favor of plaintiff, for the amount of the note and interest. Defendant sued out a writ of error from the District Court, setting forth in his affidavit, the errors in the proceedings of the justice, on which he relied. On the hearing in the District Court, the judgment of the justice was affirmed, and defendant appeals to this court. The errors complained of, as stated in the affidavit filed as the basis of the writ in the court below, will sufficiently appear from the opinion of the court.

F. Semple, for the appellant.

Marshall & Moss, for the appellee.

WRIGHT, C. J.—It is first objected that the justice erred in not dismissing the case. To this it is answered, that the justice had jurisdiction; that the title to real estate was not involved; and if it was, the question was made by defendant's pleading; and that he could not by his own pleading, raise the issue so as to oust the justice of jurisdiction. Whatever other effect the filing of such an answer might have (granting that the title to real estate was raised thereby), we are clear that defendant could not ask to have a cause *dismissed*, for any such reason. The Code, § 2262, inhibits justices from taking jurisdiction in cases where the question of title to real estate may arise. By §§ 2287, 2288, it is provided, that if in actions of trespass, the *defendant* justifies by pleading title, the justice shall make an entry thereof on his docket, and return a transcript of his proceedings and the original papers, to the District Court, as in cases of appeals. And if on the trial of any case, it appears from the

plaintiff's own showing, that the determination of the action will involve the decision of a question of title to real estate, the action must be dismissed. No provision is made, however, for a class of cases like the one before us, where the *defendant*, by his pleadings, presents an issue which may render it necessary to determine a question of title. And at present it is unnecessary that we should do more than decide, that he cannot, by raising such an issue, ask to have a case *dismissed*. If he can, by pleading under oath, so he can by pleading in the usual manner, whether in writing or orally. To permit this result to follow as a legal consequence, whenever a defendant might raise such a question by his answer, would be the means of allowing any defendant to oust the jurisdiction of the justice, in any and every case that might be brought. The defendant's pleadings should not be the test of jurisdiction in this respect. But should he make it appear on the trial, that the question does in fact arise, it might operate to transfer the cause to the District Court, but not to dismiss the case. As already stated, there is no express provision of the Code regulating the practice in such cases, but we think the course above indicated, in accordance with the reason and spirit of the law. In this ruling, therefore, the justice did not err.

It is next objected, that the justice erred in rendering judgment for plaintiff, inasmuch as the defendant's sworn answer, containing a substantial defence, was not denied by plaintiff. We think a complete answer to this objection, is, that the return of the justice shows, that defendants withdrew from the case, after his motion to dismiss was overruled. By this, we understand, that he designed to abide by his motion, and make no further appearance or defence. If so, his answer was virtually withdrawn, and there was no error in the judgment in this respect. It is finally objected, that the District Court erred, in rendering a simple judgment of affirmance. The transcript states the names of the parties, and the nature of the case, and then follows this entry: "Judgment below affirmed." The Code provides that in such cases, the District Court may render final judgment, or remand the cause to

the justice. There is no reason shown for having the case remanded, nor does the court appear to have designed to so order. As a final judgment, it is certainly deficient in form. But it is a defect of which appellant cannot complain. Such defect in no manner increases his liability, or takes from him any right. If not a judgment, decision, or order, then his appeal must be dismissed, for in that event this court would have no jurisdiction.

Judgment affirmed.

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SHRECK *v.* PIERCE *et al.*

The legal effect of contracts to make title to land, or to deliver a deed for land, under a contract of purchase, is generally that the vendor shall make a *good* title.

As a general rule, it makes but little difference what the precise terms of the contract are; whether the vendor agrees to make title, or a good title; or to make a deed, or a warranty deed; if it appears that he is selling at a sound price, to be paid, or part paid, at the time of conveyance.

In such cases, usually, the vendor, without a nice examination of words, is understood to agree for a good title, and the vendee cannot be put off with a merely good deed.

Where in an action to enforce the specific performance of a contract for the sale of real estate, it appeared that the complainant paid part of the consideration at the time of making the contract; that on the day when the final payment became due, by the terms of the contract, he went to the house of the vendor, to make the payment, and receive his title; that the vendor was absent from home; that the complainant told his business to a brother of the vendor, and offered the money, who replied that he had nothing to do with the matter, and could not receive the money; that at a given time, the parties met by agreement, when the vendor tendered a proper deed, which the complainant declined to receive, and refused to pay the money; that at the time of the tender of the deed, and the refusal to pay the money, the vendor had title to only a portion of the land; that the mother of the vendor, at the same time, tendered a deed for a portion of the land, to which she had the title, but demanded two dollars more per acre, than the contract price; that the title to another portion of the land, was in other parties; that there were incumbrances on the land; that there was no proposition by the vendor, that the purchase money should be applied to the liquidation of incumbrances; and that he subsequently tendered the remaining portion of the purchase money, and demanded a deed; *Held*, That the

complainant was justified in withholding the purchase money, and refusing the deed, under the circumstances, and that he had committed no default, by which his rights under the agreement were forfeited.

Appeal from the Delaware District Court.

THIS was a bill in chancery, filed at the November term, 1854, to enforce the performance of a contract for the sale of certain lands in Delaware county.

By a written contract of the 25th of October, 1853, John W. Price, agreed to sell and convey to Garret Shreck, four forty acre tracts, described as follows, which are numbered for convenience in future reference: 1st. The southeast quarter of northeast quarter section 36, town 88 north, range 5 west; 2d. The northeast quarter of southeast quarter of the same section; 3d. The southeast quarter of southeast quarter of the same section; 4th. Northeast quarter of northeast quarter section 1, town 87 north, range 5 west; 5th. The southwest quarter of northwest quarter section 32, town 88 north, 4 west. By the agreement, Shreck was to pay one hundred and fifty dollars down, and the remainder, that is to say, eight hundred and fifty dollars, on the first day of May, A.D. 1854. Upon this payment being made, the said John W. was to make to the said Shreck, a good and sufficient title to the premises in fee simple, with warranty.

The bill is brought against John W. Pierce, Clarence D. S. Pierce, Edward S. Pierce, Phœbe Bliss, Clark Bliss, and Peter Case. An agreement as to facts, states the said John, Clarence, and Edward, to be brothers, and the said Phœbe, to be their mother. After the death of her husband, Pierce, she intermarried with Clark Bliss, who is made formal party only.

The making of the contract as above stated, is denied by none. The defence not being of a specific and distinctive character, can be more conveniently developed by a statement of facts—an abstract of the pleadings—and in the opinion of the court.

At the time of making the contract, the parcel of land

marked No. 5, was the only one, the title to which was in John W. Pierce. This was conveyed by him to Clarence by deed, dated December 8th, 1854, which was after the commencement of this action. At the same time, the date of the contract, the title to the tracts Nos. 1 and 2, was in Phœbe Bliss. By an instrument dated June 8th, 1853, she (her husband joining) had contracted to convey this land to John and Clarence. The deed was to be made out, on or at any time before the 1st of January, A.D. 1855. But she was not to be held to make the conveyance, unless the obligees should, before that date, pay off a certain mortgage, and also pay two certain "incumbrances," amounting altogether to two hundred and eighty-four dollars, besides interest. By deed, bearing date 8th December, 1854, she conveyed these parcels to the said Clarence. This was after the commencement of the suit. The title to the tracts marked 3 and 4, was in the state at the making of the contract; but Clarence held a contract right to the same, which he afterwards assigned to Edward, for purposes which will be shown hereafter, and title was obtained from the state by Edward, November 1st, 1854, and he conveyed to Clarence, December 4th, 1854.

The substance of the answers is as follows: That of John W. admits the payment of one hundred and fifty dollars, on the delivery of the articles of agreement; but he denies that complainant tendered the $850, in pursuance of the agreement, as alleged by the latter. He denies that he refused to convey the title, until long after the first of May, to wit: until the 11th of August, 1854; but says that he repeatedly urged complainant to receive the title, and pay the $850, which the latter refused to do. He avers, that he informed complainant, that the title to part of the land was in Phœbe Bliss, and part in said Clarence; that he informed him that said Clarence held a contract from the school fund commissioner, for parcels Nos. 3 and 4, and also the southeast quarter of northeast quarter of section 1, town 87, range 5 west, (which is contiguous to and south of said No. 4, and making the east half of said northeast quarter section 1); and that said

Clarence had assigned said contract to said John, to enable him to act as his agent in the sale of the tracts Nos. 3 and 4; and that said Shreck well knew that he (said John) was acting as agent of Clarence, in the sale of these parcels. He further avers, that he informed complainant, that the said Phœbe was the owner of the tract No. 2, and that she had given him and said Clarence, a bond to convey to them, when they paid her a certain sum, and had taken up a certain mortgage to the school fund; and avers, that he showed the two last-mentioned contracts or bonds to the complainant, and that he informed petitioner that the tract No. 5, was mortgaged to the school fund. The defendant then avers, that on or about the 16th of April, 1854, he started for St. Paul, in Minnesota, to obtain from his brother Clarence, an assignment of the contract with the school fund commissioner, embracing the tract No. 4, which it was necessary for him to obtain, in order to get a certificate to enable him to get a title to the above parcel contracted to the complainant, and that although he used due diligence, he was unable to reach home until the 8th of May following; that on the 9th of May, he called on the complainant, and offered to make, or cause to be made, a title to such lands, according to said agreement; that complainant agreed that on the 15th of May, he would meet defendant and said Phœbe, at Delhi, (in the same county), and take a conveyance and pay the money; that they so met, and the said Phœbe tendered to complainant a good and sufficient warranty deed, to "her portion of said land," and this respondent offered to make a title to his and his brother Clarence's portion; but that complainant refused to receive said title, and to pay the money, and they separated. He further alleges, that on the 17th of May, plaintiff agreed to meet respondent at Delhi, and receive the title to plaintiff and Clarence's portion, and then go to the residence of said Phœbe, and receive title to her portion, and there pay the money; that respondent went to Delhi on the day, and made out his title deed, and remained until late in the evening, ready to deliver it to complainant, but he did not come. He then says, that after this, he did not see

complainant for a long time, but supposed that he did not wish to receive the title, and pay the money; and that respondent is now, and ever has been, ready to pay back the one hundred and fifty dollars, paid him on the contract. He then states, that the title to tracts Nos. 4 and 5, is in Edward; that to Nos. 1 and 2, in said Phœbe; and that to No. 5, in himself; that the bond given by Phœbe, to Clarence and himself, is now in her possession; that he has used all honorable means to induce complainant to receive the title, and is ready to repay the money paid him, and prays to be discharged.

In his answer to the supplemental bill, he admits that on the 1st of May, 1854, he was in Minnesota, or on his way returning home, and repeats the reason of his absence, but more fully than before, it being that Clarence's contract with the school fund commissioner, covered more land than that contracted to plaintiff (tracts 3 and 4), and that the commissioner would not give a certificate for a *part* only, so that respondent had need to obtain an assignment from Clarence of the whole contract, in order to fulfill his agreement with plaintiff; and, therefore, he went to his brother in Minnesota, and was unable to return by the 1st of May, and repeats what has been above stated, relative to offering performance and agreeing to meet at Delhi, and what took place there, as before given. This answer was made in November, 1854. He denies that complainant ever offered to pay the $850, till long after the 1st of May, to wit: until the 11th of August, when respondent had assigned the contract to Edward L. by order of said Clarence; he admits, that since the agreement was entered into, the lands have appreciated in value, but denies that this is the reason of his refusal to convey. He says, that when the contract was made, the land was worth more than complainant was to pay. But that Clarence and himself, were compelled to raise a certain amount of money on or before the said 1st of May, and this was their motive for entering into the agreement; and that they have sustained great damage on account of petitioner's refusal to pay. He denies that complainant has made valu-

able improvements, and avers that he has done damage, by cutting timber; and denies that plaintiff has had possession without molestation or warning, but avers that he has been repeatedly warned to leave, and was notified in writing, that unless he settled and paid the rent, legal measures would be taken to get it. He says that Edward L. was not, nor is he since, the real owner of any of said premises; that the reason why he undertook to sell land not belonging to him, was because he was directed to do so by the owner thereof. This answer was made in February, 1855.

In his amended answer to the supplemental bill, he reiterates much of the foregoing matter, and adds that he has no personal knowledge that complainant was at his house on the 1st of May, to pay the $850, but from information, he denies it; that after complainant's failure to perform his contract, respondent offered to refund the $150 paid, and has tendered the same to complainant, and has deposited it with the clerk of the District Court, and that he was authorized to sell the lands and make the contract.

The replication to these answers, in reply to the averment that petitioner was repeatedly urged to take the title and pay the money, says that there were incumbrances upon portions of the land; that for a part said John W. had only assigned contracts of purchase made with the fund commissioner; that the title to a portion was in Phœbe Bliss; that said John W. was by the contract, to make a warranty deed; that he was insolvent, and wholly irresponsible upon his covenants of warranty; and that complainant is entitled to have all outstanding incumbrances cleared off by the money due from him on the purchase; that upon further reflection, he believes the said John W. informed him that the fund commissioners had some claim on some portion of the land, and said John assured complainant, that if he would pay one hundred and fifty dollars, the said respondent would discharge that indebtedness, but he has never so done. He denies that he was informed, that respondent was acting as agent of Clarence, and avers that respondent gave no intimation whatever, that he was not the real owner of the said

land; and he avers it to be false, that he had information that said Phœbe was the owner of, or had any title to any part of the land, or anything therein, further than some sort of a lien for some amount of money, but how much he does not recollect; that said John showed him a bond for a title from her, but that complainant cannot read, and therefore has no special knowledge of its contents. He admits that they met, as alleged, at Delhi, about the 18th of May, 1854, for the purpose stated; but he avers that the said Phœbe utterly refused to give him a deed for the portion whose title was in her, unless he would pay her seven dollars per acre. But he denies making more than one arrangement for meeting respondent at Delhi, and says he has ever been, and still is, ready and willing, desirous and able, to carry out and complete his agreement. He admits that respondent did inquire of him, if he would receive back the one hundred and fifty dollars paid, and that he replied that he would not. Finally, he repeats he cannot read, and that he reposed full confidence in said Pierce, as an honest man.

The rejoinder of this respondent, to the foregoing replication, admits that there were incumbrances on a portion of the land; that for a part, said John W. held assigned contracts of the fund commissioner; that a portion was mortgaged to the school fund; and that the title to a portion was in Phœbe Bliss; but he says that these facts were made known to complainant before, and at the time of making the agreement. He denies insolvency. He denies that complainant has a right to have any of the incumbrances removed, and that he has any right or claim upon the land; and denies that he was to use the $150 in discharge of any of the incumbrances.

The answer of Clarence D. S. Pierce, made in April, 1855, shows that on the 25th of October, 1853, he held a contract from the school fund commissioner for the tracts Nos. 3 and 4, and that he also owned the tracts Nos. 1 and 2, which two last-named tracts were conveyed to said Phœbe, of whom he and said John received a bond, for the reconveyance of the same. He says, he authorized said John to sell "said land,"

so as to raise some money, which he wished to obtain as early in the spring of 1854, as practicable; that in November, 1853, he was informed by letter (he then residing in Minnesota), that said John had agreed to sell the same to complainant, and in June, 1854, he received information that plaintiff had refused to pay for the land, and thereupon he authorized said John W. to assign a portion of it to Edward L., which was in order to allow the latter to pay the amount due the fund commissioner upon the land; said Edward having a claim upon some of the land mentioned in the contract, but not upon that contracted to the complainant. He says, lastly, that he is now the owner of all the land mentioned in complainant's bill.

The replication to this answer avers, that if said Clarence was at the time of filing his answer, or now is, the owner of said land, he became so after the commencement of this suit, and with full knowledge thereof; that he paid nothing for them, and that he is not an innocent and *bona fide* purchaser without notice, and therefore has no title as against complainant.

The rejoinder of Clarence alleges, that he held the equitable title to a portion of said land at the time said agreement was entered into, and has since purchased the remainder, for a good and valuable consideration.

The answer of Phœbe Bliss, made November, 1854, denies that she ever sold and conveyed to John W. the land mentioned in the bill, but says that she gave a bond to John and Clarence, that when they should pay her a certain sum, and pay a certain mortgage to the fund commissioner, she would deed to them, or to whom they should direct, the tracts Nos. 1 and 2; that she is now the owner of said lands, and that about the 23d of May, 1854, she tendered to complainant a good and sufficient warranty deed for the same, which he refused to receive. Exceptions being taken to her answer, she further says, that said John told her of the agreement about the time it was made; that at the time she tendered the deed to complainant, she did demand seven dollars per acre for her portion of the land; that she did not object to

said John's selling the land, and that in August, 1854, said John gave her a number of papers to keep for him, among which was the bond mentioned in complainant's bill.

The answer of Edward L. states that he had not, neither has he, any interest in the lands, but that the contract for a portion of them was assigned to him, to enable him to obtain a deed to another tract belonging to him, but contained in the same contract, and that he has conveyed the land back to Clarence. The court rendered a decree in favor of the complainant, and the respondents appeal.

Ben. M. Samuels, for the appellants.

Clark & Bissell, for the appellee.

WOODWARD, J.—This was a bill to enforce the specific performance of a contract for the conveyance of certain lands, which for convenience are numbered and referred to, as in the statement of the case: 1st. The southeast quarter of northeast quarter section 36, town 88 north, range 5 west; 2d. The northeast quarter of southeast quarter of the same section; 3d. The southeast quarter of southeast quarter of the same section; 4th. The northeast quarter of northeast quarter of section 1, town 87 north, range 5 west; 5th. The southwest quarter of northwest quarter section 32, town 88 north, 4 west. The contract of sale was made by John W. Pierce, and was to make good title, and to convey with warranty deed, upon the payment of one hundred and fifty dollars down, and eight hundred and fifty dollars on the 1st of May, A.D. 1854. No default is found on the part of the complainant, and no good reason for non-performance on the part of the respondents, and therefore, the decree of this court must be in affirmance of that of the court below. The making of the contract of sale is denied by no one, nor is there any specific ground for defence set up, unless it be that the petitioner did not perform his part punctually; or that he afterwards declined performance, when the respondents, or some of them, were ready; or that the principal respond-

ent, John W. Pierce, had not the title, and, therefore, could not perform. The last of these implied or supposed grounds of defence, aims to throw the complainant off from the claim of specific performance, to an action of damages for non-performance. We are inclined to the opinion, that a specific performance is the just and true remedy, dictated by the actual state of the case. It will be necessary to look at the facts of the case, and at the position and relation of the respective parties defendant, somewhat in detail.

The contract itself requires no comment. On the 1st of May, 1854, the day for payment and performance, the complainant went to the house where the respondent, John W. Pierce, resided, with eight hundred and fifty dollars in gold, to pay on the contract, upon receiving title. This is only *formally* denied, whilst it is proved by the testimony of Smith, Paul, and Barker, the first of whom actually counted the money, and the others saw it. The complainant did not find John W., but saw Edward, with whom John lived, told him his business, and offered the money. Edward replied, truly enough, that he had nothing to do with the matter, and could not receive the money. But there is an attempt to show argumentatively, that petitioner knew that John was absent at the time. This is not very clearly shown; but what if he did know it? It was much better and easier for him, to do what was incumbent on him for that day, than to trust to proving the excuse for non-performance, namely, the absence of the respondent, John W. It will be remembered, that the reason of this defendant's absence was, that he had gone to Minnesota, to obtain from Clarence, an assignment of the contract with the fund commissioner, so as to enable him to fulfill his agreement with the petitioner. This respondent then alleges, that on his return he offered to perform, and the parties agreed to meet at Delhi, on the 15th of May, and complete the business; that he offered to execute a proper deed, and that the said Phœbe did make and tender a deed of the land held by her, but that complainant refused to pay the money, and receive the deeds. At that time, the obligor, John W., had the title to but one

of the forty acre tracts in himself; this was No. 5. The commissioners' contract for Nos. 3 and 4, was assigned to him, but the title was not in him. Phœbe Bliss, who held the title to tracts Nos. 1 and 2, tendered a deed, which might be a sufficient substitute for one from John. The effect of these offers, is nullified, perhaps, by the fact that John had not yet obtained the title to an important part of the land; but another and more conclusive answer is, that the incumbrances by mortgage and otherwise, for loans or for purchase money, were not yet discharged; nor was there any proposition that a portion of the plaintiff's payment, should be applied to their liquidation.

The legal effect of contracts to make title, or to deliver a deed to land under a contract of purchase, is generally that the vendor shall make a *good title.* As a general rule, it makes but little difference what the precise terms of the contract are—whether the vendor agrees to make title, or a good title—or to make a deed, or a warranty deed—if it appears that he is negotiating to sell at a sound price, to be paid, or part paid, at the conveyance. In such cases, usually, the vendor, without a nice examination of words, is understood to agree for a *good title*, and the vendee cannot be put off with merely a good *deed.* This rule, however, does not preclude those cases where the vendee appears to be purchasing the vendor's title, such as it may be. *Aiken* v. *Sandford*, 1 M. R. 494; *Clarke* v. *Redman*, 1 Blkf. 379; *Clute* v. *Robinson*, 2 J. 595; *Jones* v. *Gardner*, 10 Ib. 266; *Judson* v. *Wass*, 11 Ib., 525; *Tucker* v. *Woods*, 12 Ib., 190; *Robb* v. *Montgomery*, 20 Ib. 13. And the want of an existing capacity to perform, has been held a defence to notes and bonds. *Tyler* v. *Torny*, 2 Scam. 445; *Kenard* v. *Bates*, 1 Blkf. 172; *Warner* v. *Hatfield*, 4 Blk. 392; *Blann* v. *Smith*, 4 Blkf. 517; *Contra*, *Coleman* v. *Sanderlin*, 5 Humph. 562.

The complainant went to Delhi, prepared to pay his money, and take the title, but he was justified in withdrawing, when he found the condition of things still existing. Besides this, between the first of May and the time of this meeting, an attachment had been levied upon nearly half of

the land, in a suit against the respondent John. This circumstance rendered it more than ever necessary that the petitioner should be careful in the transaction. Having done all that is incumbent on his part, he is not thrown into fault by these circumstances; and still another is to be regarded, which is, that at this meeting, the said Phœbe, with the offer of her deed, demanded two dollars per acre more than had been the contract price, for that part of the land which stood in her name. We shall have occasion to revert to this again. It is then shown, that on the 11th of August, 1854, the complainant again tendered the money and demanded a fulfillment of the agreement, which was refused. This shows readiness, and that he did not consider the contract as abandoned. Within three or four months after this, the legal title to all the land is found in Clarence Pierce.

In this state of things, we do not find any default in the complainant, by which he loses his rights under his agreement. On the other hand, there is not seen anything, which can be called a legal excuse for, or justification of, non-performance. The principal respondent, the vendor, had not the legal title in himself, and therefore had not the actual ability to perform, but the question, and it is the main question in the case, is, whether he did not so stand in relation to his co-defendants, as to be able to compel them to fulfill their contracts? and whether the position or relation of them, or of some of them, is not such as to bring them within the reach of this complainant? To answer this question, we must look at them singly, and see what rights they had, and what obligations they were under. Clarke Bliss is but a nominal party, having no relation to the matter, but through his wife, formerly Phœbe Pierce, and he may be passed without further remark. Peter Case was the school fund commissioner, and is but a formal party. This answer discloses that, as such officer, he held a mortgage on part of tract No. 2, for the sum of fifty dollars. He omits to state by whom this was given, and the date of it. He also says that he held a mortgage on tract No. 5, for the sum of ninety-two dollars and fifty cents, dated July 20th, 1854, executed by

John W. Pierce. He does not state when either of these mortgage debts became due. Edward Pierce disclaims having any interest at any time, in the lands, in the bill mentioned, or any of them. He says that the commissioners' contract with Clarence, was assigned to him by the latter, only to enable him to obtain title to another parcel, in which he was interested, and that having done this, he upon the order of Clarence, assigned the contract over to John W.

We come now to Phœbe Bliss, who is more intimately connected with the matter of the bill. She held the title to tracts Nos. 1 and 2. Her answer is not a satisfactory one. She does not answer fully and specifically. She admits making the bond to Clarence and John, but does not give the date, amount, nor term, for which the mortgage therein referred to, was given, nor by whom, nor the amount which she claimed as due her; and when exceptions were taken to the answer, she evades, or at least omits, answering to the most essential portions. But she states some things which assist us to a conclusion. Of this character is the statement that she did not object to John's selling the land; that she offered the deed to complainant, on the 15th of May, at the request of John; and that she did demand seven dollars per acre for the land; and it further appears, from the papers in the cause, that on the 4th of December, 1854, she with her husband conveyed these two tracts to Clarence. Thus, there is sufficient to show, that whatever claims she had in regard to the land, were satisfied as far back as the 15th of May, and that from that time she only represented Clarence and John, or one of them. As to her demand of seven dollars an acre for the land, the only remark needed is, that her contract did not leave her at liberty to make such a requirement. She says she was to convey upon the payment of the mortgage and a certain sum due to her. This was irrespective of any rate per acre. But if she had the right to ask this, it was a question between her and the asignees in her bond. Shreck had nothing to do with it. The only effect of this demand, therefore, was to neutralize the tender of the deed to the complainant. We conclude, then, that Phœbe Bliss does not

stand in the petitioner's way to a decree for a specific performance.

We come to the consideration next of Clarence Pierce's position. He answers that on the 25th of October, 1853 (the time of the agreement), he held the fund commissioners' contract for tracts Nos. 3 and 4, and owned Nos. 1 and 2; that he conveyed to the said Phœbe, and took the bond to John and himself; that he caused the assignment of the commissioners' contract for Nos. 3 and 4, to Edward, only to enable him to obtain title to a certain parcel, not embraced in this suit. This being done, no interest remained in Edward. As we understand his answer, he says he owned (at least the equitable, or contract title to) parcels Nos. 1 and 2, at the time when the agreement was made with Shreck, and that he assigned it to Phœbe after that. But upon looking at the answer of Phœbe and John, we are led into some doubt of the meaning. The answers of Clarence, John, and Phœbe, are none of them full, clear, and satisfactory. On the whole, the conclusion is, that Clarence so answers, and Phœbe does not contradict it, nor does she state anything inconsistent with it. She says that she "is now," (at the time of answering), the owner of the said lands. It would seem that on the 25th of October, 1853, Clarence was the equitable owner under the contracts of purchase from the fund commissioner, or otherwise, of all the tracts named in the bill, except No. 5, and that John had the title to that; that Clarence conveyed to Phœbe, and took the bond to John and himself; that he authorized John to sell the land in order to raise money; and that he stands under equal obligations with John, for the performance of the contract with Shreck. Perhaps little need be said in relation to the answer of John Pierce, as most of the remarks pertinent to it, have been made upon the other answer. He denies the offer of the $850, and denies that he refused performance until long after the first of May. He says he has no *personal* knowledge of Shreck's coming to his residence and making a tender on the first of May, and therefore denies. It will be remembered that he had gone to Minnesota at the time. He disingenu-

ously answers, that he *saw* no money, and that the petitioner never *showed* him any, referring to the tender on the 11th of August, 1854, when the proof shows, that complainant had the gold in a bag, which respondent did see, and that he was told that it was money, besides indications that it was such. But there are two thoughts presented in his answer, which require a little more notice. He says, and repeats with emphasis, that he informed the petitioner at the time of the contract, of the state of the title, and of the incumbrances. This forms no defence to the complainant's claim. It does not lessen the respondent's obligation under his contract, but only shows that he undertook to obtain the title, and to clear off the incumbrances. Another thought which he presents argumentatively is, that the complainant knew that he was acting as the agent of Clarence. By this, he means that he was so acting, as to a portion of the land only, for one parcel, No. 5, belonged to himself alone; of Nos. 1 and 2, he and Clarence held the equitable interest jointly, and of Nos. 4 and 5, Clarence was the real equitable owner, whilst the contract for those was assigned to John, to enable him to sell. The petitioner's knowledge of this agency, constitutes no defence to the bill. Finally, during the autumn of 1854, and down to February, 1855, after this suit was commenced, we find the legal title to all these lands, including not only those of Phœbe, but those of John, to be centered and vested in Clarence. In all this transaction, Clarence and John are as one, with authority on the one side, and with full knowledge on the other. The complainant has been punctual, and has done all that was incumbent on him. The respondent, John, shows no valid reason for not fulfilling his agreement; and the other defendants by their own answers respectively, show that they hold no position entitling them to object to a performance, and Clarence is in substance identified with John W.

Therefore, it is the opinion of this court, that the decree of the District Court should be affirmed, both generally and in detail.

POSTLEWAIT & CREAGAN AND KEELER *v.* HOWES *et al.*

Where a creditor's bill, to reach the equitable estate of a party who is deceased, is filed, the administrator of the intestate, is a necessary party to the bill.

The law contemplates the appointment of an administrator in all cases, where the intestate dies within the state, or where he shall die a non-resident of the state, having property to be administered upon within the county, or where such property is afterwards brought into the county; and in the absence of some averment or showing to the contrary, the appellate court cannot presume that administration has not been granted.

Where a creditor's bill alleged that the complainants recovered certain judgments against R. G. A. as the surviving partner of the firms of A. B. & Co. and J. & R. G. A., and that R. G. A. died, leaving a widow (the respondent), but did not state when or where he died, nor whether the said J. A. was still living; and where the administrator of R. G. A. was not made a party, and the bill made no reference to the administrator or estate of J. A. although it appeared from the proof that he died in California, nor negatived the fact that there were such administrators; *Held*, That there was no sufficient reason shown by the bill or proof, for not making the administrator of the intestate, a party to the bill.

Where a proceeding is instituted in which it becomes material to ascertain the condition of the assets of the estate of an intestate, or in which a complainant seeks to make his claim chargeable on the real estate in the hands of the widow or heirs, and no administrator has been appointed, the cause should be continued to give an opportunity for such an appointment.

In a proceeding in equity, to reach the equitable estate of an intestate, and subject the same to the payment of his debts, the objection that his administrator is not made a party to the bill, may be made on the hearing

Where, however, the objection is made, for the first time, on the hearing, the bill will not be dismissed; but the cause will be remanded (if in the appellate court), with leave to the complainant to bring in the necessary party.

Where it appeared from a creditor's bill, that one of the judgments described therein, was obtained in the name of one of the complainants, for the use of a third party, but the bill alleged that the said judgment was the property of the said complainant; *Held*, That this averment was sufficient to show that the complainant was the party in interest, and being such, the suit was properly brought in his name.

Where a creditor's bill described several judgments, which were recovered against R. G. A. as surviving partner of two different firms, and one judgment which was recovered against the firm of J. & R. G. A.; and where it was urged against the bill on the hearing, that the administrators of the other deceased partners were not made parties, and that it should be shown that there were no *partnership* assets, before the creditors could seek to reach an equitable interest in the individual property of one of the partners; *Held*,

1. That it was at the option of the complainants to proceed, either against the surviving partner, or against the representatives of the deceased partners. 2. That having elected to take judgments against the surviving partner, they had the further right, to seek to make such judgments from his individual property; and that the administrators of such other partners, need not be made parties. 3. That in relation to the judgment against the firm, the bill should have made the administrator of J. A. as well as of R. G. A. a party, and shown that his estate was insolvent, and that there were no partnership assets from which to make such judgment.

Where a creditor's bill was filed against the widow of a deceased debtor, to reach real property alleged to have been purchased with the money of the deceased, and the title taken in the name of the respondent, for the purpose of defrauding creditors; and where it was urged upon the hearing, that the respondent was entitled to dower in the premises, and that her rights should be protected in this proceeding; and where the respondent made no such claim, by her answer, or otherwise preferred it; *Held*, That under the circumstances, should she even be entitled to dower, such claim unpreferred and unassigned, could not defeat the rights of the creditors, to subject to sale the interest of the husband in the property.

Although the Code, as well as the statute of 1843, requires that judgments on which executions have not issued within five years from the date of their rendition, shall be revived by *scire facias*, before a party can have execution to enforce their collection, such judgments are not dormant, but remain and continue in full force and virtue.

The jurisdiction of courts of equity, where the object is to remove obstacles alleged to have been fraudulently interposed to prevent the collection of judgments, is exercised *not* to aid legal process, but independent of, and without reference to such process.

Judgment creditors have the right to ask the aid of a court of equity, to remove obstructions in the way of the collections of their judgments, though they may afterwards be required, before obtaining execution, to revive such judgments by *scire facias*.

Where it appeared from a creditor's bill, that executions on the judgments described therein, had not been issued within five years from the date of the rendition of such judgments, and it was urged, that as executions could not issue on such judgments, until revived by *scire facias*, the complainants had no right to proceed in equity to subject property to the satisfaction of the same; *Held*, That the ability or right, or the want of ability or right, to issue execution, is not the test by which to determine whether a judgment creditor has a right to file such a bill.

Where a creditor's bill charges, and where it is proved on the hearing, that the debtor is in fact insolvent, and that an execution, if issued, must necessarily be returned unsatisfied, there is no reason for requiring the creditor to go through the fruitless form of exhausting his legal remedy, by return of execution, no property found.

Where the proceeding is against the estate of a decedent, the rule that the creditor must show that he has exhausted his legal remedy, before he can

proceed in equity against the equitable assets of the debtor, has no fair or legitimate application.

Appeal from the Des Moines District Court.

THIS was a creditor's bill filed by complainants, to reach certain real estate held by the respondent, Mary A. Howes, which they allege should be made liable to the payment of certain judgments which they obtained against her late husband, Robert G. Anderson. The bill alleges that on the 1st day of February, 1845, the complainants, Postlewait and Creagan, recovered two several judgments against the said Anderson—one being against him as the surviving partner of the firm of Anderson, Bennett & Co., and the other as surviving partner of the firm of J. & R. G. Anderson; and that on the 14th of June, 1844, said Keeler, for the use of one Shornberger, recovered judgment against James & R. G. Anderson, and afterwards on the 12th of November, of the same year, another judgment, for the use of the same person, against the said Robert G., as survivor of the said J. & R. G. Anderson, all of which judgments are averred to have been rendered by the District Court of Des Moines county, and to be still in full force, and wholly unsatisfied. The bill further charges, "that at the time said judgments were rendered and ever since, the said Robert G. had no visible property, from which said judgment could be made; that execution was issued upon one of said judgments and returned, no property found; and that your orators have been wholly unable to make the amount thereof, from the said Robert G." It is also shown by the bill, that in November, 1845, and March, 1849, the said Robert G. purchased the property in the bill described, paid therefor with his own means, but procured the deed for the same to be made to his wife, Mary A. (since intermarried with the respondent, John M. Howes), for the purpose of defrauding said complainants and his other creditors, and to hinder and delay them in the collection of their debts. When or where the said R. G. departed this life, is not shown—the only averment on this subject,

being "that said Robert G. has departed this life, leaving the said Mary A. his widow." Nor is there any averment that said James Anderson is not still living, further than may be inferred from the statement, that one of the Keeler judgments was obtained against the said Robert G. as survivor, &c. The bill is filed against the said Mary A. alone—the administrator of the said Robert G. is not made a party, nor is any reference made to the administrator or estate of the said James Anderson.

The answer denies that said judgments were obtained; denies the fraud; avers that the property was paid for from defendant's own means; and that it does not belong to the estate of Robert G. This bill was filed October 3d, 1853. The cause was heard on bill, answer, replication, and depositions; dismissed without prejudice, as to the said P. and C., and sustained as to the said Keeler, and a decree entered that the real estate be sold to satisfy his judgment. The complainants P. and C., and the respondents appeal. Other matters material to the decision of the case, will appear from the opinion of the court.

D. Rorer, for the appellants.

1. The record shows that Keeler is not a party in interest. Shornberger is the *real* party in interest, to the Keeler judgments at law, the Keeler judgments having been for his use. Keeler could not receipt them, nor discharge them. "Civil actions must be prosecuted in the names of the real parties in interest," &c. Code, § 1676. Then Keeler cannot prosecute this suit, Shornberger is the *real* party in interest, and should have filed the bill, stating his recovery in Keeler's name, but for his use. *Edmonds* v. *Montgomery & Shaw*, 1 Iowa, 143.

2. Three of the judgments relied on in the bill are dormant. No execution was issued on them, nor can issue until revived by *scire facias*. Laws of 1843, § 50, 478; Code, § 1886.

3. To maintain the bill, if otherwise sustained, the complainants must be in a condition to issue executions on their

judgments at law, and as to *each of them*. *McElwain* v. *Willis et al.*, 9 Wend. 559; *Child* v. *Bunce et als.*, 4 Paige, 309; 1 Maun. (Mich.) 213; *McKinley* v. *Combs*, 1 Monroe, 106; *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; *Brinkerhoof* v. *Brown*, 4 Johns. Ch. 651; *Weed* v. *Pierce*, 9 Cow. 722; *Parmalee* v. *Egan*, 7 Paige, 610.

4. The only exceptions to this rule, are: 1st. Where the proceeding is against personal property, as in *Beck* v. *Burdett*, 1 Paige, 308; or where the proceeding is against the administrator or executor of a deceased debtor (possibly), as in *Nelson* v. *Hill*, 5 How. 127.

These are cases relied on by complainant in this case, but really are not applicable to the case at bar, as this is a case against, not the administrator or executor of the deceased debtor, but against his widow in her individual capacity, seeking to divest her of a legal estate, under a pretence that it was conveyed to her at her husband's procurement, in fraud of his creditors, whereas it does not appear by the bill, nor pleadings, but that the estate of the deceased husband in the hands of the administrator, is amply sufficient to pay this and every other debt. But it is argued that there is no administration on the estate of Robert G. Anderson—that he died in California, &c. The evidence on this subject is *silent*. If there is no administration, then the creditor can administer. Although the bill avers there was no *visible* property, yet there may be money.

5. Parts of the depositions were improperly admitted in evidence. See the bill of exceptions as to the proof of Robert G. Anderson's declarations, by Mr. Lewis, and by Mr. Sunderland. *The declarations of the husband are not admissible*. *Chapin* v. *Pease*, 10 Conn. 69; *Alexander* v. *Goold*, 1 Mass. 165; *Woodruff* v. *Whittlesey*, Kirby (Conn.) 60; *Reichart* v. *Castators*, 5 Binn. 109. It will be seen too, that the objections were taken on filing cross interrogatories, the earliest possible opportunity, claimed again at the trial, and when overruled, *exceptions* were taken.

6. If these objections to parts of the depositions were well taken below, they are available on appeal; and the part

thus objected to, should now be excluded. *Wilson* v. *Troop*, 2 Cow. 195; *Atkinson* v. *Marks*, Ib. 691. The court above, after excluding the irrelevant, inadmissible testimony, if it reverses the decree, should proceed to make such decree as ought to have been made by the court below. *Diffendorf* v. *Winder*, 3 Gill & John. 311.

7. The statute of Elizabeth against fraudulent conveyances—which is the original basis of all proceedings of this nature—does not apply to this particular case, in principle. It applies to *alienations* of property by the debtor, and *not to money investments* made by him for the benefit of others. 1 Amer. Leading Cases, 77; *Crozier* v. *Young*, 3 Mon. 157; *Gowing* v. *Rich*, 1 Iredell's Law, 553. It is conceded, however, that in equity (where nothing else can be reached), such investments may be laid hold of. 1 American Leading Cases, 77. But neither the bill, nor the evidence in the case before us, make out such a case—for it does not appear but that the judgments might all be made off the estates of the decedents, although Robert G. Anderson may not have had visible property as alleged, but of which there is no proof; and if they can, then, however gratuitous this conveyance to Mrs. Anderson (Mrs. Howes), may have been on the part of her then husband, or at his procurement, still it is conscientious and good in equity, against him and his creditors, and the creditors of the *firms* of which he had been or was a member, *provided* that *he*, or those *firms*, or the estates of *him*, or of the *other members* of these *firms*, are *good for these debts*; and if any other member is made to pay more than his proportion, he must first look to the *estate* of Robert G. Anderson for contribution, if such estate is *able*, before even he could call on the widow for the proceeds of even a *voluntary settlement made on her* by her husband.

8. The said judgment creditors can only look in equity, to such surplus of the estate of separate partners, as may remain or be found, after the separate debts of such partner are satisfied—and so creditors of individual partners, have no claims on copartnership funds, until the copartnership debts are paid. But the decree in this case, *overrides* both

these principles. See *Wilder* v. *Keller*, 3 Paige, 167; *McCulloh* v. *Dashiel's admr.*, 1 Har. & Gill, 96; *Alsop* v. *Mather*, 8 Cow. 584; *Caldwell* v. *Stielman*, 1 Rawle, 212; *Bell* v *Newman*, 5 Serg. & Rawle, 78; *Wilby* v. *Finney*, 15 Mass. 116.

9. The administrators of the said Robert G. Anderson, and of the other copartners or judgment debtors, have not been made defendants to said judgments, and there may be personal effects in the hands of the administrator or administrators, sufficient to pay said judgments, and if so, such personal effects are first liable. See decision of this court, in the case of *Hiram Reynolds and others* v. *May & Andor*, not published; also *Child* v. *Bunce*, 4 Paige, 309; Story's Equity Pleadings, §§ 172–3 and 4, and 181; *McKay* v. *Greer*, 3 Johns. Ch. 57; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Wire* v. *Smith*, 4 Gill & John. 297; *Lawrence* v. *Trustees*, 2 Denio, 577; *Stewart* v. *Carson*, 1 Desau. 500; *Rogers* v. *Rogers*, 1 Paige, 188; *McCloud* v. *Roberts*, 4 Hen. & Munf. 443; *Hoice* v. *Brewer*, 3 Gill & John. 153; *Piatt* v. *Saint Clair*, 6 Ham. 233; *Piatt* v. *St. Clair's Heirs*, Wright, 526; *Clows* v. *Dickenson*, 9 Cow. 402; *Garnett* v. *McCoun*, 6 Call, 308; *Grant* v. *Duane*, 9 Johns. 591; *Bank of U. S.* v. *Richie et als.*, 8 Pet. 128; 4 Kent's Com. 421; *Vose* v. *Philbrooks*, 3 Story, 335. "Where a bill in equity is brought to recover a debt against a deceased partner, the other partners are proper and necessary parties." *Vose* v. *Philbrook*, 3 Story, 335; *Nelson* v. *Hill*, 5 Howard, 128. This latter case will be claimed, it is believed, as authority in behalf of the complainants in this case; but an examination of the reported case, will show it to establish: 1. That that case was against the representatives (administrators) of the deceased partner, and not against a *grantee* of the decedent, or of a person conveying at the instance and procurement of the decedent. 2. "That the creditor of a partnership may at his option, proceed at law against the *surviving partner*, or go in the first instance into equity against the *representatives* of the deceased partner," and the reason is *obvious*, for in either event, the creditor is still after a partner debtor, or the

estate of such partner; but the present effort is to pass by the estate or representatives of the deceased, and to seek out property alleged to have been conveyed or procured to be conveyed to a third person as a gift, which gift, if it was one, must be held sacred until the estates of the giver and of his copartners, debtors in the same debt, are exhausted.

In the case referred to in 5 Howard, 133, the court say: "It is the right also of the representatives of the deceased partner, Whitsett, and that of the surviving partner, Hill, to participate in settlements in which their interests are decidedly involved; and an omission in the bill to convene these *joint* parties in interest for this purpose, with the representative of the other deceased partner, Gray, would have exhibited a *palpable and material defect in the proceedings* of the complainants." Then it is clear, that the administrators of James Anderson, deceased, and of Bassett, and of Robert G. Anderson, should be made co-defendants, before equity could charge this property in the hands of Mrs. Howes, even if otherwise liable. And if James Anderson's estate is good for the debts of Keeler, or Robert G. Anderson's estate is good for the debts of Keeler, in that event, he, Keeler, cannot maintain this bill; and if the estates of Bassett or of James Anderson, are either of them good for the debt of Postlewait & Creagan, then they cannot maintain this bill. In the case from 5 Howard, 133, the court say: "In order to ascertain the precise extent of Gray's responsibility, (Gray was the administrator of Thomas, one of the partnership debtors), *accounts* should be proper, not only between the *two firms* and *their respective creditors*, but also *between these firms themselves*." Again, in the same case, it is clearly shown, that the individual property of the deceased, Robert Anderson, could not be reached, unless the effects of the firm are exhausted.

10. By the exhibits, it will be seen, that two-thirds, twenty feet, of the ground, was conveyed by Cox and wife, to Mrs. Anderson, as early as the 19th day of November, 1845, and she holds by no other title. This bill was not filed, or suit commenced, until the 23d day of September, 1853. The

remedy was barred by statute of limitations, which need not be pleaded, but this court decides by analogy to the statute. Code of Iowa, § 1695, 245; *Lewis* v. *Marshal*, 5 Pet. 470.

11. In any event, Mrs. Anderson, as widow of Robert G. Anderson, would be entitled to her dower in the property, against creditors and every one else, even if the title was in her husband's own name, and not the less so, as it is in her name and sought to be charged as his. *Blow* v. *Maynard*, 2 Leigh, 30. But what that dower is, whether in fee or for life, does not certainly appear, as neither bill, answer, exhibits, nor evidence, shows the date of said Robert Anderson's death; not less, however, than a life estate in one-third, by any law that is or has been in force.

12. There is no evidence to show but that Robert G. Anderson was perfectly solvent when his wife received the deed from Cox and from McCutchens, and the circumstance that *three of the judgments* have become dormant, and no step has been taken until after Robert's death, is a suspicious one; especially as this very claim may have been *barred* in *probate*, and that fact may have been in the way of making the respective administrators co-defendants. See Code, §§ 1373, 1367. From the latter reference, it will be seen that complainants could not enforce either of these judgments in probate court, before taking a certain oath, however able the estates of the decedents may have been; and I think that under said section, and according to the decision of the case of *Reynolds et als.* v. *May & Andor*, decided by this court, that complainants must first go into probate. In that case, this court say: "When the debt is established against the executor, and the estate in his hands proves insufficient to pay, and the heirs have received a part of the estate, they can be called upon to surrender up a sufficient amount to pay the demand." In the case at bar, it is true that there are judgments and not unliquidated debts, as in the Reynolds' case, but the same principle applies to each, as the Code, referred to above, requires that, "unsatisfied judgments rendered prior to the death of the decedent, shall be entered in the catalogue of claims, and so much thereof be allowed as the

plaintiff will show by his own oath or otherwise, is still unpaid." Code, § 1367. This section seems to be conclusive as against complainants.

13. The bill is demurrable, and such demurrable defect may be objected on the final hearing. Story's Equity Pleadings, §§ 503, 504, 505; *Baker* v. *Biddle*, Bald. C. C. 394; where it is laid down, that "an objection," for want of parties, want of equity, &c., "need not be made by demurrer, plea, or answer, but may be made at the hearing or on appeal," and so say our rules of court. The bill then is: 1. Demurrable for want of proper parties. 2. For want of averments that the judgments have been entered and allowed in probate, in the *catalogue of claims* against the several estates or against said Robert G. Anderson's estate, and for want of the oath required by said section 1367 of the Code. 3. Demurrable as to Keeler, for as much his judgments *belong to Shornberger*. 4. Demurrable as to three of the judgments, for want of executions, and returns of *nulla bona*. It is obvious to my mind, that on the case made in the bill, the complainants cannot hold the property in question liable.

Starr & Phelps, for the appellees.

This case comes up on appeal by both parties, thus presenting the whole case on its merits. The facts charged in the bill, are conclusively established by the evidence, and the whole case turns upon questions of law, raised by defendants.

It is insisted by defendants: 1. That complainants are not entitled to relief, because they have not exhausted their remedy at law, by issuance of execution on *all* their judgments. We insist that this in the case at bar, was unnecessary, because in this class of cases, courts of equity have jurisdiction on two grounds: 1. That the original indebtedness was that of a *partnership*. 2. Because the proceedings are against the *estate of a decedent*.

In these two cases, a court of equity has jurisdiction in the first instance. No execution could issue against a deceased debtor. *McDowell* v. *Cochran*, 11 Illinois, 32; *Doolittle* v.

Bridgman et al., 1 G. Greene, 265; *Nelson et al.* v. *Hill et al.*, 5 Howard, 127; *Hagan* v. *Walker*, 14 Howard, 29; *Thurman* v. *Reese*, 3 Kelly, (Geo.) 449.

One execution was returned *nulla bona*, after the last judgment was rendered, and the bill charges, and the answer does not deny, "*nulla bona*," and the fact is also proved by the deposition of J. P. Sunderland. It was not necessary to revive judgment by *scire facias*. *Hagan* v. *Walker*, 14 How. 35. 2. Defendants insist that we should make the administrator of Robert G. a party. But there was no administrator. The testimony shows that Robert G. died in California, leaving no property here, which shows that no administrator could have been appointed here. It was not our duty to have one appointed, nor are we compelled by any rule of law to do so. The defendant Mary A. had the first right to the appointment, if any could be made, and it is not for her to object now that none has been appointed. Again, this is not a case in which it is absolutely essential to make the administrator a party. It is only absolutely necessary when there are assets in his hands which are *primarily liable*. *Vide* Story's Equity Pleadings, § 74 *a*; also, Ib. §§ 170 to 177. But this objection comes too late. It should have been raised by demurrer, plea, or answer, which should have pointed out the essential parties. Story's Equity Pleadings, §§ 170 to 177 *a*, and §§ 237, 541, 2 and 3; *Child* v. *Brace*, 4 Paige, 314.

3. Defendants say that we are *partnership* creditors, and cannot come upon the separate estate of the debtor, and cite numerous authorities. This doctrine does not apply when the question arises between the debtor or his representatives and his creditors, but is only enforced as between creditors. 1 Harris & Gill, 96. The authorities cited by defendants are cases between *separate and partnership* creditors.

4. It is urged that Keeler's judgments being for the use of Shornberger, the latter is the beneficial owner, and Keeler cannot maintain this bill. But this is only matter of abatement, and cannot now be urged, as the point was not made by demurrer, plea, or answer, and having answered to the

bill, defendant is estopped from denying complainants' capacity to sue. Again, the bill avers, and the answer does not deny, that Keeler is the owner of said judgments; it is, therefore, admitted.

5. The statute of limitations does not apply to this case. It does not run against trust estates. The point is not raised by demurrer, plea, or answer, and cannot be raised now. The old statute of limitations did not extend to cases of *frauds*, and the present statute had not barred them, when this bill was filed.

6. Defendant, Mary A. Howes, claims *dower* in the land. To this she is not entitled. We are seeking to subject the *funds* of the debtor, which have been improperly applied by him to the purchase of the land, to the payment of our claims. In equity, he should have employed them in paying those claims, and we have an equitable lien on those funds for that purpose, and no improper act of his can divest that lien; but courts of equity, which treat that which is unlawfully done, as if it had not been done, and in carrying out this principle, treat money as land, and land as money, will consider and treat this land as money, of which the defendant is not endowable. The case is in principle the same, as if the defendant had unlawfully taken her husband's money, and laid it out in the purchase of real estate in her own name. Her husband was never seized of any estate in the land, and she, upon no principle, can claim dower therein.

We ask a final decree in this court, in favor of Postlewait & Creagan, for the amount of their judgments and interest, and that the decree in favor of Keeler and against Roads be affirmed, and that the real estate in dispute be decreed to be sold, and the payments applied first to the payment of complainant's claims and costs, and the balance to T. Roads, or defendant Mary A. Howes, or their legal representatives. There can be nothing gained by sending the case back to be tried anew, unless the court should consider it necessary to remand the case, in order that an administrator should be appointed and made party defendant. We may add, that there is nothing in the case to

show that the deceased partners of Robert G. left any assets or have any administrators, and were the fact otherwise, we are not judgment creditors of theirs, nor could we become so, no suit being allowable against their executors, except under peculiar circumstances.

WRIGHT, C. J.—To reverse the decree below in favor of the complainant, Keeler, and to sustain so much of it as dismissed the bill as to the other complainants, the respondents have urged various grounds, which we proceed briefly to notice. The first in order is the objection, that the administrator of the estate of Robert G. is not made a party to the bill. Complainants admit substantially, that under ordinary circumstances, the administrator should be joined in bills of this character. It is urged, however, by them, first, that in this instance, there was no such personal representative; and second, that the objection comes too late.

There is nothing in the bill in express terms, negativing the fact that there is such administrator. On this subject nothing is said. The law contemplates the appointment of such administrator, in all cases when the intestate dies within the state, or where he shall die a non-resident of the state, having property to be administered upon within the county, "or where such property is afterwards brought into the county." In the absence of such averment, or showing to the contrary, we cannot presume that administration has not been granted. But it is said, that the non appointment of an administrator is shown from the fact, that decedent is averred to have had no property within the state, and from the further fact, that he was a non-resident at the time of his death. The bill does not disclose when Anderson died. The proof shows that he died in California, but for anything that appears, his family was at the time within this state, and he, in legal contemplation, a resident of it. *Penley* v. *Waterhouse*, 1 Iowa, 498; *Hinds* v. *Hinds*, 1 Ib. 36. But if we should even grant that the non-residence and want of a legal interest in property, was sufficiently shown, we cannot think the practice regular or safe, to proceed in

cases of this character, without having an administrator appointed. It is the duty of an administrator to protect and guard the interest of the estate, and to see that claims are only paid in the due and regular course of administration. The personal estate is primarily liable for the payment of debts, and the real estate can only be reached, in the event that the personal effects are inadequate to satisfy the debts and charges. It is his duty to collect such personal assets, and to defend against any claims which may not be a just charge against the estate. The widow, or heir, as such, have no such duties devolving upon them. The administrator becomes the personal representative of the deceased, stands in his place and stead, and no judgment can properly be taken for a claim against an estate, until such administration. To seek to subject the real estate, whether legal or equitable, of the heir, in the first instance, to the payment of a claim against the decedent, would certainly be novel and subversive of the whole policy of the law, regulating the settlement of estates. *May and Andor* v. *Heirs of Reynolds*, June T. 1854. If a proceeding should, therefore, be instituted, in which it becomes material to ascertain the condition of the assets of the estate, or in which a complainant seeks to make his claim chargeable on the real estate in the hands of the widow or heirs, and no administrator has been appointed, the cause should be continued, to give an opportunity for such an appointment, which appointment, under the law, may be made, either at the instance of the creditors or those adversely interested. We conclude, therefore, that there is no sufficient reason shown by the bill or proof, for not making the administrator a party. The remaining question on this part of the case is, whether the objection comes too late?

Courts of equity aim to do *complete* justice, and not to do it by halves. To accomplish this, it is eminently necessary that the bill should bring before the court, all proper and necessary parties. The rights of no one should be finally decided in a legal or equitable tribunal, until he has an opportunity to appear and maintain or vindicate his right; and to enable a court of equity to do *complete* justice in every case,

it reasonably and even necessarily follows, that where a decision is made upon any particular subject matter, "the rights of all persons whose interests are immediately connected with that decision, and affected by it, shall be provided for as far as they reasonably may be." If it shall appear by the bill, that a proper party is not so before the court, as to afford him an opportunity to be heard, the usual method is to demur, or to make the objection by plea or answer. And if his non-joinder cannot *prejudice* the rights of the parties before the chancellor, the objection should be made by demurrer, plea, or answer, and will not be fatal, if urged for the first time on the hearing. But if it appears that the rights of those who are made parties, may be prejudiced by such non joinder, or that there may be a failure to mete out complete justice, the objection may be made on the hearing, or the chancellor himself may state the objection, and refuse to proceed to make a decree; and in this respect, the proceedings in courts of law and equity present a most striking difference. At law, as a general rule, only persons directly and immediately interested in the subject matter, and whose interests are of a legal nature, need be made parties. In courts of equity, however, the general rule is as stated by Lord HARDWICK, that all persons ought to be made parties who are necessary to make the determination complete, and quiet the question. *Poor* v. *Clarke*, 2 Atk. 515; Story's Equity Pleadings, §§ 74 *a*, 75, 76, 76 *a*, 237, 541; 1 Daniell's Ch. Pleadings and Practice, 295, 330; 2 Story's Equity Jurisprudence, § 1526.

The question remains then, whether it is necessary to make the administrator a party in such a proceeding as the one before us, in order to prevent prejudice to other parties—mete out complete justice—and quiet the question in controversy; and much that we have already said is applicable to this inquiry.

Would not the ancestor, if living, be a necessary party? To this question, there can be but one answer. Why is he necessary? One reason, not to name others, is, that he may have an opportunity to show that the judgments have been

paid, or that he is solvent; for in either event, the alleged creditors have no right to inquire into any alleged fraud connected with the sale of the property. He alone is presumed to be able to show these facts, or to have in his possession, and under his control, the required evidence. If then *he* would be a necessary party, why not his administrator, who becomes his representative, and who is by the law intrusted with the duty of settling the estate. He is presumed to know whether the debt is paid, or whether the estate is solvent, and should have an opportunity to be heard. If the debt is paid, or the estate solvent, the proceedings would of course fail. But in addition to this, the administrator is the trustee for *all* of the creditors, and it is his duty to protect the property for their common benefit, as well as to preserve and hold for the heirs, what may remain after all debts are satisfied. How are the rights of other creditors to be protected, if the grantee alone is made a party, as in this case? They have no opportunity to be heard, even through the administrator, the common trustee.

We have found no case, in which the administrator has been held not to be a necessary party. On the contrary, the books abound in cases in which the necessity of making him a party is recognized. 1 Daniell's Ch. Pl. & Pr. 330; Story's Eq. Pleadings, §§ 170 to 173; *McDowell* v. *Cochran*, 11 Ill. 31; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Bank U. S.* v. *Ritchie et al.*, 8 Peters, 128; *Lawrence* v. *Trustees, &c.*, 2 Denio, 577; *Wise* v. *Smith*, 4 Gill & Johns. 297; *Sweney et al.* v. *Ferguson*, 2 Blackf. 129. And this rule finds strong support from the following sections of the Code, 1918, 1367, 1369, 1436.

The administrator should have been made party, and the objection may be made on the hearing. For this reason, the decree below in favor of Keeler, is erroneous, and as a consequence, correct so far as it denies relief to the other complainants. Where, however, the objection is made for the first time on the hearing, we are unwilling to recognize the rule, that such want of proper parties shall operate to dismiss the bill. The better practice is to remand the cause, with leave to complainant to bring in the necessary parties. This

practice has been recognized by this court. *Kriechbaum* v. *Bridges & Powers*, 1 Iowa, 14; and will be found to be sustained by authority. Story's Equity Pleadings, §§ 239, 541.

This view of the first question, must result in reversing the cause, and remanding it for further proceedings; and ordinarily we should not examine other points made by counsel. As many of them may arise, however, in a subsequent trial, we deem it proper to dispose of those which seem to be most important. It is urged by respondent, that the judgments in favor of Keeler, were recovered for the use of Shornberger, and that Keeler has, therefore, no right to prosecute this action. The bill, however, charges that the said judgments are now the property of the complainant. This is sufficient to show him to be the party in interest, and being such party, he properly brings this suit.

It is next urged, that the administrators of the other deceased partners are not made parties, and that it should be shown that there are no *partnership* assets, before the creditors can seek to reach an equitable interest in the individual property of one of the partners. All of the judgments, except one, are against Robert G. Anderson alone. The complainants had a right to such judgments. It was at their option to proceed either against the surviving partner, or against the representatives of the deceased partners. And having elected to take judgments against the surviving partner, they have the further right to seek to make such judgments from his individual property; and the administrators of such other partners need not be made parties. Story on Part. § 362, note 3, and *Nelson* v. *Hill*, 5 How. 133. One of the judgments, however, in favor of Keeler, appears to have been rendered against James, as well as Robert G. Anderson. If he is dead (which is left indefinite by the bill), we think his administrator, for reasons already stated, should be made a party; and it ought also to be shown, that his estate is insolvent, and that there are no partnership assets from which to make such judgments.

It is further claimed, that the respondent is entitled to

dower in this property, and that her right in this respect, should be protected in this proceeding. At present, it is perhaps sufficient to say, that she makes no such claim by her answer, nor has she otherwise preferred or asked it; nor has any assignment of it been made. Under such circumstances, should she even be entitled to dower in this property, such claim unpreferred and unassigned, could not defeat the right of the creditors to subject to sale the interest of the husband therein. *Claussern* v. *La Franz*, 1 Iowa, 227.

Respondents further urge, that a portion, if not all, the judgments of complainants are dormant, and that as executions could not issue thereon, until revived by *scire facias*, they have no right at this time to proceed in equity to subject property to satisfy the same. We think, however, that the ability or right, or want of ability or right, to issue execution, is not the test by which to determine whether a judgment creditor has a right to file such a bill. Though the Code (§§ 1886, 1887), as well as the statute of 1843, 478, requires that judgments, on which executions have not issued within five years from the date of their rendition, shall be revived by *scire facias*, before a party can have execution to enforce their collection, yet such judgments in fact, remain and continue in full force and virtue. They continue to be liens on the real estate of defendant for *ten* years, and the statute of limitations could not be successfully pleaded to any action brought on the same, until after the lapse of *twenty* years from their rendition. Laws of 1846, 33; Code, § 2489. It is not strictly true, therefore, to say that these judgments were dormant at the time of filing this bill. There may have been no right to issue execution, but for all other purposes, they continued in full life and had legal existence. And it is proper to bear in mind, that the jurisdiction in such cases, is exercised, not to *aid* legal process, but independent of, and without reference to, such process. The object is to remove an obstacle, which it is alleged is fraudulently interposed to prevent the collection of these judgments. As such creditors, they have a right to ask its removal, though when removed, they should even be turned over to their proper in-

dependent *legal* remedy, to obtain the process of the law to make the sale. The case of *Hagan* v. *Walker et al.*, 14 How. 29, and *Burrough* v. *Elton*, 11 Vesey, 28, are directly in point, and clearly recognize the doctrine, that a judgment creditor may thus proceed in equity, though he might afterwards be required before obtaining execution, to revive his judgment by *scire facias*.

Another objection, and the one perhaps most strongly pressed, is, that complainants have not exhausted their legal remedy, by having execution issued and returned *nulla bona*, and that until this has been done, they have do right to ask equitable aid. On the part of respondents, it is claimed to be the settled law, that the return of an execution unsatisfied is necessary, before the chancellor has jurisdiction of a bill of this character; that the insolvency of the debtor must be first shown; and that this cannot be done in any other way than by a return of *nulla bona*. Complainants, on the other hand, insist that the jurisdiction is not determined *alone* by such *return* of no property found, but that if it can be otherwise shown, that there is no other property, and that the issuing of an execution would be unavailing, the right to follow the equitable estate, is as complete and perfect, as after a return of *nulla bona*. But if this is not true, he, in the second place, insists that such return is not necessary, where the proceeding is against a decedent's estate. Aside from the adjudicated cases, we strongly incline to the opinion, that the first position of complainants is in accordance with reason and common sense. If the creditor shall charge in his bill, and prove on the hearing, that the debtor is in fact insolvent, and that an execution, if issued, must necessarily be returned unsatisfied, we see no reason for requiring him to go through the fruitless form of exhausting his legal remedy, by return of execution, no property found. Under such circumstances, there is no legal remedy to exhaust, for he shows that he has none. It is true that such returns of *nulla bona*, may in legal contemplation, be the most *satisfactory* method of establishing the fact of insolvency, but practically it would be scarcely more conclusive or convincing to the mind of the chancellor,

than if proved by other means or in other ways. And yet, doubtless, the current of authorities hold such return to be necessary; and without at this time, further doubting or questioning the reasonableness of such rule, we think it has no fair or legitimate application, when the proceeding is against the estate of a decedent. As already stated, the personal property of the decedent is primarily liable to the payment of his debts. As to this portion of the estate, the judgment creditor has no priority or preference over others. If this shall be insufficient to pay the debts and charges, the administrator may upon proper showing, obtain an order to sell the real estate. And as to this portion of the estate, the judgment crditor has no preference over other claims, except such liens as are allowed by law in his favor. The personal estate is to be administered and distributed by the administrator. It cannot be sold under execution issued, or any judgment recovered, in the lifetime of the decedent, nor can the real estate be made subject to such execution, until the administrator, heirs, and devisees, are made parties to such judgments, and an order of court obtained awarding execution against the same. Then, as he cannot take personal property, and cannot reach the legal estate in lands, until he obtains an order of court awarding execution, why shall an estate be compelled to pay the expense of such a proceeding that can avail nothing, if the equitable property is all there is from which the judgment can be made? And this suggestion is of conclusive force, when it is borne in mind, that in order to have such execution, he must aver that there is real estate, describing it, against which the execution should be awarded. The law does not require vain things; *Collins* v. *Vandever*, 1 Iowa, 378; neither does it require impossible things.

But independent of the view arising from the statute, we are satisfied that the rule requiring a return of *nulla bona*, has no application when the creditor's bill is filed against a decedent's estate. Such cases form exceptions to the general rule. And in some of the states, the exception is carried so far as to allow the creditor to proceed in chancery, to reach

the equitable estate of one deceased, before judgment, and this has been permitted in our own state. *Brigman* v. *Doolittle*, 1 G. Greene, 265; and see *Thompson* v. *Brown*, 4 Johns. Ch. 630; *Sweney* v. *Ferguson*, 2 Blackf. 129; *Kipper et al.* v. *Glancey et al.*, Ib. 356; *O'Brien* v. *Coulter*, Ib. 421; *Russel* v. *Clarke's executors*, 7 Cranch, 89; *McDowell* v. *Cochran*, 11 Ill. 31.

Other questions are raised by counsel, of less importance than those above noticed. But as the cause will be remanded and reheard, we forbear at present any reference to such other points, and especially so, as from the attitude of the case, after bringing in the necessary parties, such questions may not arise. We may add, however, that it may well be doubted, whether the insolvency of the decedent is averred with sufficient distinctness, and whether a satisfactory adjudication of the matters in controversy, would not be more certainly attained, if both parties should be allowed to replead.

So much of the decree as sustains the bill in favor of Keeler, is *reversed*, and the whole cause remanded with leave to amend, &c.

GORDON, Administrator *v.* PITT.

Where two joint and several obligors on a promissory note, unite in their answer, and make the same defence, and the verdict of the jury is against both, the court, under section 1815 of the Code, may grant a new trial as to one, and not as to both of said defendants.

Where the evidence is conflicting, and the court below has overruled a motion for a new trial, based upon the insufficiency of the evidence to sustain the verdict, the appellate court will not disturb the judgment.

After verdict, on a motion for a new trial, it is too late to raise questions that were not relied upon, by answer or otherwise, and in relation to which no instructions were asked, or exceptions taken.

Appeal from the Louisa District Court.

SUIT to recover of Samuel Pitt, and William Parker, the

amount of two joint and several negotiable promissory notes, for $300 each, given by them, payable to plaintiff's intestate, dated November 9th, 1847, and payable respectively in fourteen and twenty-six months, with interest at the rate of ten *per centum per annum*. The answer of defendants denies all indebtedness, and avers that the notes were given to John Pitt in his lifetime, as accommodation notes; that no consideration was received for them, by defendants, or either of them; and that the notes were given to enable the said John Pitt to obtain money for his own benefit; and that the money obtained on the notes by negotiation, has been fully paid. On this answer, issue was joined, and the evidence given as set forth in the bill of exceptions. The court instructed the jury, that the plaintiff was not entitled to recover, if they believed from the testimony that the notes were given as accommodation notes to John Pitt; and that the jury could return a verdict against one or both of defendants. The bill of exceptions claims, that plaintiff's attorney stated to the jury, before they retired, that he did not claim a verdict against defendant, Parker. The jury returned a verdict against both defendants for $1,133.50. The defendants separately filed motions in arrest of judgment, and for a new trial. The motion was sustained as to defendant, Parker, and overruled as to defendant, Samuel Pitt. Judgment on the verdict, from which defendant, Pitt, alone appeals.

The following errors are assigned by defendant, Samuel Pitt: 1st. That the court erred in instructing the jury, that they could find a verdict against one or both defendants. 2. In granting a new trial to one, and not to both defendants. 3. In rendering any judgment, except on the finding of the jury. 4. In overruling Samuel Pitt's motion in arrest of judgment, and for a new trial. 5. In not granting a new trial to both defendants, when it appeared on trial, that Bodeman, while the holder of the note, released defendant, Parker. 6. In not arresting the judgment and granting a new trial to both defendants, when it was conclusively proven on

the trial, that plaintiff, as administrator of John Pitt, had no right of action on the promissory notes.

Browning & Tracy, for the appellant.

Starr & Phelps, for the appellee.

STOCKTON, J.—The defendant claims that the court erred in instructing the jury, that they might return a verdict against one or both of the defendants. The answer to this is, that if the instruction was erroneous, which we are not prepared to admit, we do not see that the defendant, Pitt, is prejudiced thereby, since the verdict was against both defendants. It is claimed, in the second place, that the court erred in granting a new trial as to one, and not as to both defendants, and the question is distinctly presented, whether in the case of the joint and several obligors on a promissory note, who unite in their answer, and make the same defence, where the verdict of the jury is against both, it is permissible for the court to grant a new trial as to one, and not as to both of said defendants. We should state further, that the question in this case, is made not by the plaintiff, but by the defendant to whom the new trial was refused.

We are not satisfied that it was a sufficient reason for granting the new trial to Parker, that the plaintiff waived any verdict against him before the jury retired, and we are quite as far from being satisfied that the defendant, Parker, should have been permitted to set up as a defence against any verdict or judgment against him, that he was merely an accommodation party to the note. Without going into these questions at present, although they seem to have been somewhat relied upon by the plaintiff, as furnishing the ground of the action of the court in granting the new trial to Parker, we proceed to inquire simply, whether defendant, Pitt, was entitled to a new trial, for the reason that a new trial had been granted to Parker? The defendants in the District Court, by their joint answer, deny that they or either of them, received any consideration for the notes, and aver

that they were given as accommodation notes, to enable John Pitt to raise money on them for his own benefit, by negotiating them; to this answer there was a denial. The cause being submitted to the jury, on issue joined, a verdict was returned in favor of the plaintiff against both defendants. We are not asked, at present, to decide whether the court properly arrested the judgment as to Parker; and the sufficiency of the reasons operating on the mind of the court, in granting him a new trial, are not before us for review. To deny, however, to the court the power and authority to refuse the new trial to Pitt, would be to assume that no state of case could arise, and no defence be made by Parker in the action against him, which would not be equally as effectual for the discharge of his co-defendant, Pitt. In other words, that if Parker, at a subsequent trial, should make good a defence which would discharge him of the obligation of the notes, Pitt ought to be equally discharged. This position we do not wish to be compelled to assume. Both defendants, it is true, appear equally and jointly bound on the notes; and whilst we recognize the well settled rule of law, that if two or more are jointly bound, or jointly or severally, and the obligee releases as to one of them, all are discharged. 2 Parsons on Contracts, 23. Yet it is quite as well settled, that a state of facts may be shown to exist as to one joint obligor, which would release him from his liability, and leave his co-obligor still liable. The Code (§ 1815,) may afford some light on this subject, and furnish the fullest authority for the action of the District Court. The section reads as follows: "Judgment may be rendered for or against one or more of several defendants; or the court when practicable, may determine the ultimate rights of the parties on each side, as between themselves, and give judgment accordingly." The court may have been of opinion, that there was sufficient ground for rendering judgment against Pitt, and for arresting the same as to Parker, and granting him a new trial, as authorized by the above recited section. Whether the discretion vested in the court, was properly exercised in granting the new trial to Parker, we are, as before remarked,

not called upon to determine. But in refusing the new trial to Pitt, we cannot say, that under the circumstances, or for the reasons alleged, there was any such error in the judgment of the court, as that defendant, Pitt, can complain, or that this court should interfere to reverse the judgment of the District Court, and order such new trial. These remarks will suffice to dispose of the second and third assignment of errors.

It is claimed, in the fourth place, that the evidence was insufficient to warrant the verdict of the jury, and that the same should have been set aside as against the weight of the testimony. That there is a conflict in the testimony, we have no hesitation in admitting. Two of the witnesses testify to hearing John Pitt say, at different times, after the notes were given, that Samuel Pitt did not owe him anything; that the notes were given to enable him to pay for his lands; and that if he had not got them, he would have lost his land. On the other hand, it is shown, that John Pitt had negotiated the notes, and that they had passed out of his hands at the time of said conversation; that about the time said notes were given, John Pitt sold to Samuel one hundred and twenty acres of land; and one of the witnesses testifies, that in a conversation he had with both of the Pitts, in the spring of 1850, and about the time that Samuel Pitt was starting for California, he understood from them that Parker had signed the notes as an accommodation party, but that he did not understand from them, that Samuel Pitt had signed them as such; and he received the impression that Samuel owed John the amount of the notes, and that Parker had signed them to enable John Pitt to negotiate them, and raise money to pay for a tract of land he had bought; and that Samuel Pitt's note at that time, would not be considered very good. Upon this state of evidence, the jury found that Samuel Pitt was liable on the notes, and the District Court having refused to grant the motion for a new trial, on the ground of the insufficiency of the evidence, we are not disposed to disturb the decision.

It is claimed by defendant further, that it is shown by the testimony, that while Bodeman was the holder of the notes

sued on, Parker was released from the payment of them, and that such release discharged Samuel Pitt. It does not appear that this defence was in any manner relied upon at the time, in the court below, either by plea or otherwise. No instruction was asked of the court upon the point, nor any exception taken. The only evidence given, remotely bearing upon it, was by Kaster, one of plaintiff's witnesses, who testified, that about the time that Samuel Pitt was going away to California, Parker became uneasy about the notes, and witness understood that John Pitt executed a deed of trust on his land, and a bill of sale on his horses, to Bodeman, the holder of the notes, so as to relieve Parker from the payment of the notes. The court was asked to infer from this testimony, that Bodeman had released Parker, one of the joint and several obligors; and that Samuel Pitt was thereby released also. We do not think the evidence authorized any such conclusion, even if the defendant was in a position to make the objection in this court. The court below was not asked to instruct the jury, that the release of Parker by Bodeman, was equally a release of Pitt, and after verdict, it was too late to raise that question, on a motion for a new trial.

The last point made by defendant is, that the District Court erred in not granting both defendants a new trial, for the reason that plaintiff had no right of action, the notes appearing to have been assigned to Bodeman, without ever having been re-assigned to plaintiff's intestate. It appears from the record, that the assignment on the back of the notes to Bodeman, had been erased before suit brought. This was sufficient to enable plaintiff to recover, without a re-assignment to John Pitt. The holder of a negotiable note, is presumed to have the beneficial interest in it. He may strike out any indorsement on it, and being the payee, may bring the action in his own name. *Conant* v. *Willis & Bradley*, 1 McLean, 427. But this question was first made to the court on the motion in arrest of judgment, after the verdict by the jury in favor of the plaintiff. It was too late at that stage of the proceedings, to make any objection to the plaintiff's

title to the notes. The question should have been raised on the trial, when plaintiff, if necessary, might have had an opportunity to explain the manner in which the notes came into his possession, or into the possession of his intestate. There being, therefore, no error in the decision of the District Court, in refusing to arrest the judgment as to Samuel Pitt, the judgment will be affirmed.

Judgment affirmed.

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ZUGENBUHLER *v.* GILLIAM AND THOMPSON.

Where the plaintiff alleged in his petition, that he is the owner of the south twenty-five feet and five inches of lot No. 72, in the town of Dubuque; that there is a two story brick building thereon, also owned by him, in which he resides, and carries on his business; that the defendants have commenced the erection of a building on the adjacent lot, No. 72 *a*, on the south of the plaintiff's lot, and that they have cut holes in the wall of plaintiff's building, and were preparing and threatening to use the south wall, for the purpose of introducing therein, and supporting thereon, the joists and other fixtures of the building by them commenced, without the consent of plaintiff, and against his express direction, which acts "will be greatly to the damage of petitioner, to wit: in the sum of five hundred dollars;" which petition claimed damages, "for the trespass aforesaid," to the sum of money above demanded, and also asked for an injunction, which was granted; and where the answer of the defendants admitted that the plaintiff was the owner of lot No. 72, and averred that his said building is situate partly beyond the line between lots 72 and 72 *a*, and is in part upon the latter; that one A. is the owner in fee of said lot 72 *a*, which is a corner lot in the block or square; that they are erecting a building on lot 72 *a*, and have cut some holes in plaintiff's wall, in which they intend to insert brick and joists, for the support of their building, as they have a right to do; that before they commenced the erection of their building, the said A. offered to pay the plaintiff, for one-half of said wall; and that he is still ready and willing so to do; and where the plaintiff replied, denying that A. had offered to pay him half the value of the wall, and averring that he has always been, and still is, willing that A. and his lessees should use the wall as a partition wall, on paying him one-half the cost of erecting the same, and one-half the value of the land upon which it stands; and where the testimony of experienced surveyors was taken, as to the location of plaintiff's building, whose evidence was conflicting, and thereupon the court appointed three referees, to survey the lots and report to the court, who reported that the building of the plaintiff, stood in the front two

inches, and in the rear six and three-fourths inches upon lot 72 *a*; and where the court dissolved the injunction, and rendered judgment against the plaintiff for costs.

Held, 1. That the case was an action for trespass.

2. That for the want of all those averments in the petition, which are requisite to authorize an injunction in a case of trespass, the injunction could not be sustained.

3. That the action of trespass could not be sustained, for the acts alleged to have deen done by the defendants.

4. That the plaintiff had the right to build his wall midway on the line between the two lots.

5. That the defendants, by building into, and using the wall, made it a party wall, and became liable to contribute to the cost of its erection.

The act entitled "An act respecting walls in common," approved January 24, 1855, (Laws of 1855, 130), is but declaratory of the common law on that subject.

Appeal from the Dubuque District Court.

THE plaintiff alleges that he is the owner of the south twenty-five feet and five inches of lot No. 72, in the town of Dubuque, Iowa, and that there is a two story brick building thereon, also owned by him, in which he resides and carries on his business; that the defendants have commenced the erection of a building on the adjacent lot, No. 72 *a*, on the south of the plaintiff's lot, and have cut holes in the wall of plaintiff's building, and were preparing and threatening to use the south wall for the purpose of introducing therein, and supporting thereon, the joists and other fixtures of the building by them commenced, without the consent of plaintiff, and against his express direction and will, which act he alleges, "will be greatly to the damage of your petitioner, to wit: in the sum of five hundred dollars. Wherefore, your petitioner claims damages from," the defendants, for the trespass aforesaid, to the sum of money above demanded, and asks judgment therefor, with costs. He then prays a writ of injunction to stay the doings of the defendants, and for such further relief as may be proper in the premises.

The defendants' answer, admits that the plaintiff owns lot No. 72, but avers that his said building is situated partly

beyond the line between lot No. 72 and 72 *a*, and is in part upon the latter. They allege that one Ames is the owner in fee of said lot 72 *a*, (which is a corner lot in the block or square), and that they have leased the same from him. They admit that they are erecting a building on lot 72 *a*, and that they have cut some holes in plaintiff's wall, in which they intend to insert brick and joist, (and have done so partially), for the support of their building, and this they claim they have a right to do. They allege, that before they commenced the erection of their building, the said Ames, the owner in fee, offered to pay the plaintiff for one-half of said wall, and that he is still ready and willing so to do. The plaintiff in his replication denies that Ames has offered to pay him half the value of the wall, and avers that he has always been, and still is, willing that Ames and his lessees should use the wall as a partition wall, on paying him one-half the cost of erecting the same, and one-half the value of the land upon which it stands. A considerable amount of testimony was taken, it being principally that of experienced surveyors, to show on the one hand, that the plaintiff's building was wholly on lot 72, and on the other that it stood partly on lot 72 *a*. Many of the witnesses found it to stand partly on the latter lot; the witnesses varying from two to eight inches, in the front, and from six to ten inches in the rear. During the pendency of the cause, the District Court appointed three commissioners to survey the lot with care, and report upon this question. They reported that plaintiff's building stood in the front two inches, and in the rear six inches and three-fourths, upon lot No. 72 *a*. Whereupon the court ordered that the injunction, (theretofore ordered), be dissolved, and that the defendants recover their costs of the plaintiff. After this apparently final judgment, the court appointed one Hetherington, to appraise the wall between the parties, who reported thereon at the next term, that is the May term, 1855. And the cause then coming up on the said report, it was ordered and adjudged, that as a final judgment was entered at the last term of the court, the cause be stricken from the docket. The plaintiff appeals.

Burt & Barker, for the appellant, cited Laws of 1855, 130; 2 Bouv. Ins. 178.

Smith, KcKinlay & Poor, for the appellees, cited *Rankin* v. *Charless*, 19 Missouri, 490; *Norway* v. *Rowe*, 19 Vesey, 147; 3 Paige, 213; 8 Vesey, 89; 5 Metcalf, 148; 3 Kent's Com. 437; 1 Domat. 439.

WOODWARD, J.—We have endeavored to take such a view of this cause, as to sustain the plaintiff in court, and in the action as it now stands, without examining it too strictly, give the relief which is finally indicated in this opinion. It is too manifestly an action for a trespass, to permit of its being called a bill in chancery, and dealt with accordingly. Neither can the injunction be sustained, for the want of all those averments which are requisite to an injunction in a case of trespass. *Cowles* v. *Shaw*, 2 Iowa, 496. Again, the judge or court trying the cause instead of a jury, has found the plaintiff's building to be upon the defendants' lot. This fact suggests the question, whether an action in the nature of trespass, can be sustained for the acts here done by the defendants? and we are inclined to think that it cannot. The case does not profess to have brought all the evidence to this court; nor is it intended probably, that we should review the testimony, as upon a motion for a new trial, and it is not our province to do so. We must take the *facts* as found and reported by the court below, and not the evidence upon which the facts rest.

It is very likely that the plaintiff's wall may have been erected beyond his line through mistake; for it is well known that hardly any two surveys will precisely agree, and give a town lot the same exact locality or boundaries. This difficulty is experienced where the survey must be accurate, even to an inch and less. Perhaps no two of the surveyors who were witnesses in this cause, concurred entirely. As the result of all the survey and testimony, the court find that the plaintiff's house is on the defendants' lot two inches in the front, and six inches and three-quarters in the rear. But it

is immaterial, we conceive, whether the building was so placed through mistake or intentionally. It is probable that the owner of lot 72, would have a right so to place it. This subject matter is referrable to the head of urban servitudes or easements. And under this view of it, there was no wrong in placing the wall midway on the line. And on the other hand, the defendants cannot gratuitously appropriate it. Neither Ames nor his lessees, have sought to have the wall removed. They build into it—they use it—and in so doing, they make it a party wall, and become liable to contribute to its cost, if the plaintiff should file his petition based upon these grounds. Bouvier (2 Inst. 178) says, where only one of the owners of two adjoining lots, wishes to build, he has a right to build the wall of the usual thickness, partly upon his own ground, and partly upon the adjoining estate. In this case, where the other owner is desirous of building, he may use so much of such party wall as he may want, by paying one-half of its value to the first builder, and then they are joint owners of so much of such party wall. And see Bouv. Dict. tit. Party Wall; 3 Kent, 435; 1 Dall. 367. The act of January 24, 1855, (pamphlet laws, 130,) is based upon the law, as above briefly expressed, and is probably but a declaration of the common law on the subject. Thus it seems unnecessary to spend time in the midst of pressing duties, to determine whether an action as for a trespass, would or would not lie in any imaginable case; but we have thought it more conducive to the interest of the parties, to venture upon these suggestions, as probably tending to the peaceful settlement of a matter concerning which there is very little cause for litigation. The judgment of the District Court will be affirmed.

After the above opinion was filed, a petition for a rehearing was presented, upon the ground that the judgment rendered would constitute a bar to a further proceeding. That judgment being regarded as one of nonsuit only, it is not considered as presenting the difficulty suggested.

WAGNER *v.* BISSELL.

The common law rule, that every man is required to keep his cattle within his own close, under the penalty of answering in damages for all injuries arising from their running at large, is not in force in the state of Iowa.

Where in an action of replevin for certain cattle, the defendant answered, denying the plaintiff's right to the possession of the cattle, and also alleged as a special ground of defence, that the cattle, (which he admits to be the property of the plaintiff), did, on the 17th day of August, 1856, trespass upon the *uninclosed* land of defendant, and while so trespassing, and after he had suffered damage thereby to the amount of fifty dollars, he distrained the same, as he had a right to do; and while thus lawfully distrained, and while he thus rightfully had the possession, the said plaintiff replevied the said cattle, without paying, or offering to pay for the damages so sustained, to which answer the plaintiff demurred, and the demurrer was sustained by the court; and where the defendant refused to answer over, and judgment was thereupon rendered against him; *Held*, That the demurrer was properly sustained.

Appeal from the Jones District Court.

THIS was an action of replevin for certain cattle. Defendant answered, denying the plaintiff's right to the possession, and also alleging as a special ground of defence, that said cattle, (which he admits to be the property of plaintiff,) did on the 17th day of August, 1856, trespass upon the *uninclosed* land of defendant, and while so trespassing, and after he had suffered damage to the amount of fifty dollars, he, said defendant, distrained the same, as he had a right to do; and while thus lawfully distrained, and while he thus rightfully had the possession, the said plaintiff replevied the said cattle, without paying, or offering to pay, for the damages sustained. To this answer, the plaintiff demurred, which was sustained. Defendant refused to answer over, and judgment being against him, he appeals.

W. J. Henry, for appellant.

The demurrer of the plaintiff to the answer of the defendant, should have been overruled. The demurrer is to the

whole answer of the defendant, when the answer presents a general and special bar to the plaintiff's cause of action. The question raised by the special matter set up by the defendant in his answer, has never been adjudicated by the Supreme Court of this state, and is one of vital importance to the farming interest of the state. The common law authorities are uniform in holding, that one man is not bound to fence his land against the cattle of another; but on the contrary, every man is bound under the penalty of being counted a trespasser, to keep such animals as are the subjects of absolute property, upon his own soil. See 1 Cowen, 91; 16 Mass. 33; 19 Johnson, 385; 2 H. Bl. 527.

It only remains then, to be seen how far this principle of the common law has been changed by the legislation of this state. Section 913 of the Code, provides that when any person is injured in his land, he may recover his damages, by an action against the owner of the beast, or by distraining the beast doing the damage; provided, that if the beast were lawfully on the adjoining land, and escaped therefrom in consequence of the neglect of the person suffering the damage, to maintain his part of the division fence, the owner of the beast shall not be liable for such damage. This section of the Code may be said to embrace all the statutory provisions now in force, in any manner changing the common law. This provision of the Code is analogous to the provisions made by the statute of the state of New York, under which there have been a number of adjudicated cases, which establish the principle that the ordinary declaration in an action of trespass *quare clausum fregit*, is sufficient to entitle the plaintiff to recover in the first instance, and the burthen of averring and proving that the beasts were lawfully on the adjoining close, and escaped therefrom in consequence of the neglect of the party injured to maintain his part of the division fence, or that the defendant had a license or a right of common in the land of the plaintiff, is on the defendant. In *Wells* v. *Howell*, 19 Johnson, 385, it was decided that an owner of an uninclosed field, may maintain trespass against an owner of a horse grazing there, unless the defendant shows

a right to permit his cattle to go at large. The nucleus of all the authorities in relation to this subject, is the ancient maxim that no man shall take advantage of his own wrong or negligence in his prosecution or defence against another, and that he is bound to use anything that is his, so as not to hurt another by such user. See 6 Mod. 314.

Thus the court will see from the weight of authority, that the question in relation to the right of the plaintiff to maintain replevin for cattle impounded, damage feasant cannot be raised on demurrer, as the section of the Code above referred to, gave to the defendant the right to impound cattle thus taken, unless they were rightfully on the adjoining close. The doctrine enunciated by the Supreme Court of the state of Illinois, in the case of *Seely* v. *Peters*, 5 Gilm. 130, stands unsupported by the decision of any other state of the Union, and indeed it cannot be entitled to much weight. It is a case too, upon which the court was divided in opinion, and I think that the dissenting opinion of Judge CATRON, is entitled to far more consideration than the opinion of the majority of the court; but as this and other decisions of the Supreme Court of Illinois, are relied upon by the counsel for the plaintiff, I propose to look more particularly into the authority upon which they are based, and first: It was not pretended that these decisions were founded upon the common law; but upon the contrary, the court itself admits that it was an alteration of the common law principle, and claimed to find their authority under a statute of the state, but as we have not a similar statute, those cases can be entitled to but little consideration; for indeed if such a statute did exist, I should be inclined to doubt its constitutionality; as the right to the soil is an absolute right, and where such right is once acquired, no subsequent act of legislation should be allowed in any case to limit the exercise and enjoyment of such right.

Again, it is claimed that there is a right of common in this state; but if such a right exists, it must be founded upon custom, as we have no statute granting any such right, and it will scarcely be seriously contended that a right founded

upon custom would be good, as one of the incidents necessary to make a good custom is, that it must have existed so long, that the memory of man runneth not to the contrary; and in a state that has been inhabited only about twenty years, such custom is not good, and if there was a custom existing in some parts of the state, allowing cattle to run at large, it could not be taken notice of *ex officio* by the court, on a demurrer to the defendant's answer, but should have been pleaded.

The question in relation to stock running at large, was made the subject of legislative action, in this state, in the year A.D. 1844. See Acts of 1844-5, p. 22, § 7. By which act it was provided, that in all cases where there was no fence, or if in the opinion of the fence viewers, the fence over or through which the trespassing animal entered, be not a lawful fence, according to the requirements of the first section of this act, no damage shall be recoverable. This act was repealed by the Code, § 913. The action of the legislature shows conclusively, that this principle of common law has been adopted in this state, and that it is now the common law of the state.

Joseph Mann, for the appellee.

The plaintiff contends that he had a right to hold defendant's cattle for damage done by them upon uninclosed land, until such damage was paid; which perhaps would be correct, if the common law upon the subject of inclosure prevails in this state, and he had complied with the requirements of the statute in making his statement, describing the land, &c., and having the fence viewers to assess the damage, &c.

Chapter 53 of the Code, under which the plaintiff in error bases his right to distrain the defendant's cattle, presupposes him to have his land inclosed with a lawful fence, for section 913, provides, "that if the beast be on the adjoining land, and escaped therefrom in consequence of the neglect of the person suffering the damage, to maintain his part of the

division fence, the owner of the beast shall not be liable for such damage."

The common law rule, that the owner of a close was not bound to fence against the adjoining close, has never been adopted in this state. There is no principle of the common law so inapplicable to the condition of our country and people, as the one which is sought to be enforced now for the first time, since the settlement of the state. It has been the custom in Iowa, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large, and no one has questioned their right to do so, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fence. Not until now has it been contended, that the common law rule, that the owner of cattle was bound to fence them up, was in force in this state.

The universal understanding of all classes of the community, upon which they have acted, by inclosing their crops and letting their cattle run at large, should be entitled to consideration in determining what the law is. See 1 Bl. Com. 76; 2 Ib. 31; Lill. Reg. 516.

It would be an absurdity for the legislature to pass acts from time to time, (which has been done,) restraining certain stock from running at large, if all stock were by law prohibited from running at large.

The plaintiff shows in his answer, that the land damaged was not inclosed, but in common, so that if there was any damage done, it was occasioned by his own negligence, and he has suffered *damnum absque injuria.* See 12 John. 433. In Illinois, where there is a similar statute to our own, it has been decided that the common law requiring the owner of cattle, hogs, &c., to keep them upon his own land, does not prevail there, and that the tenant of land in this state is bound to fence against cattle. See 5 Gilm. 130, and 13 Ill. 609.

The plaintiff admitting that the cattle belonged to defendant, and that he had no fence on the land damaged, and hav-

ing failed to show in his answer, that the fence viewers had assessed to him any damage, but on the contrary, admitting that the defendant was damaged in the sum of five dollars, for the wrongful detention of the cattle, the court below were justified in entering judgment for the defendant in error, and it should be affirmed.

WRIGHT, C. J.—Appellant first claims, that there was error in rendering final judgment on the demurrer, for the reason that it was to the whole answer, and should have been overruled, as to so much as denied, or took issue upon the material allegations of the petition. This objection would be clearly good, but for the fact that the record in substance shows that this part of the answer was abandoned. An examination of the judgment satisfies us, that the defendant relied upon his special grounds of defence, and admitted that if these were not good, he could not gainsay plaintiff's right to recover. By this admission, he must be bound.

There is then but one question in the case, and that is, whether the defendant for the reasons stated in his answer, was entitled to the possession of the property, as against the plaintiff and owner. We are of opinion that he was not, and that the demurrer was therefore properly sustained.

That at common law, every man was bound to keep his cattle within his own close, under the penalty of answering in damage for all injuries arising from their being abroad, is admitted by all. And a part of the same rule is, that the owner of land, is not bound to protect his premises from the intrusion of the cattle of a stranger, or third person; and that if such cattle shall intrude or trespass upon his premises, whether inclosed or not, he may, at his election, bring his action to recover the damages sustained, or distrain such trespassing animals, until compensated for such injury. We need not at present stop to ascertain the origin or reason of this rule. It is sufficient to say, that as a principle of the common law, it is well, and we believe universally settled. We are then led to inquire, whether independent of any statutory provisions, this rule is applicable to our condition and

circumstances as a people? and if it is, then whether it has, or has not, been changed by legislative action?

Unlike many of the states, we have no statute declaring in express terms, the common law to be in force in this state. That it is, however, has been frequently decided by this court, and does not, perhaps, admit of controversy. But while this is true, it must be understood that it is adopted only so far as it is *applicable* to us as a people, and may be of a general nature. At this time, we need only discuss the question, whether the principle contended for, is applicable? for there can be no fair ground for claiming that it is not of a general nature.

We have assumed, that it is only so much of the common law as is *applicable*, that can be said to be in force, or recognized as a rule of action in this state. To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force, until changed by some legislative rule, we believe has never been claimed, neither indeed could it be, with any degree of reason. What is meant however, by the term *applicable*, has been thought to admit of some controversy. As stated by CATRON, J., in the dissenting opinion in the case of *Seely* v. *Peters*, 5 Gilm. 130; "does it mean applicable to the nature of our political institutions, and to the genius of our republican form of government, and to our constitution, or to our domestic habits, our wants, and our necessities?" He then maintains that the former only is meant, and that to adopt the latter, is a clear usurpation of legislative power by the courts. A majority of the court held in that case, however, as had been previously decided in *Boyer* v. *Sweet*, 3 Scam. 121, "that in adopting the common law, it must be applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions." And we can see no just or fair objection to this view of the subject. Indeed, there would seem to be much propriety in saying, that the distinction attempted, is more speculative than practical or real. For what is applicable to our wants, habits and necessities as a community or state, must necessarily to some ex-

tent, be determined from the nature and genius of our government and institutions. Or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and live under these institutions. We have adopted a republican form of government, because we believe it to be better suited to our condition, as it is to that of all people—and thereunder we believe our wants, rights, and necessities, as individuals and as a community, are more likely to be protected and provided for. And the conclusion would seem to fairly follow, that a principle or rule which tends to provide for, and protect our rights and wants, would harmonize with that form of government or those institutions, which have grown up under it.

But, however this may be, we do not believe that in determining as a court, whether a particular rule of the unwritten law is applicable, we are confined alone to its agreement or disagreement, with our peculiar form of government. To make the true distinction between the rules which are, and are not, applicable, may be frequently embarrassing and difficult to courts.

Where the common law has been repealed or changed by the constitutions of either the states or national government, or by their legislative enactments, it is of course, not binding. So also, it is safe to say, that where it has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force. Bouvier's Law Dict., title Law Common. And in accordance with this position, are the following authorities: "The common law of England, is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Packard*, 2 Peters, 137. And see other remarks of the learned judge, in delivering the opinion in that case, page 143, which have a bearing upon the principal question involved in this.

In *Goring* v. *Emery*, 16 Pick. 107, in speaking of what parts of the common law and the statutes of England, are to be taken as in force in Massachusetts, SHAW, C. J., says: "That what are to be deemed in force, is often a question of difficulty, depending upon the nature of the subject, the difference between the character of our institutions, and our general course of policy, and those of the parent country, *and upon fitness and usage.*" And in *The Commonwealth* v. *Knowlton*, 2 Mass. 534, it is said, that "our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were adjudged inapplicable to their new state and condition."

In Ohio, the rule is laid down as follows: "It has been repeatedly decided by the courts of this state, that they will adopt the principles of the common law, as the rule of decision, so far only as those principles are adapted to our *circumstances, state of society, and form of government.*" *Lindsley* v. *Coats*, 1 Ham. 243; see also *Penny* v. *Little*, 3 Scam. 301.

Is the rule of the common law, relied upon by the appellant in this case, applicable to our situation, condition, and usage, as a people? Is it in accordance with our habits, wants, and necessities? As applied to this state, is it founded in reason and the fitness of things? The legislature has certainly not so regarded it. On the contrary, we hope to be able to show, that what legislation we have, clearly recognizes the opposite rule. At present, we are considering the question without reference to any legislative interpretation or action.

These same inquiries were substantially discussed in the case of *Seely* v. *Peters*, above referred to; and as we could not hope to answer them more satisfactorily than is there done, we adopt the language used in that case, the appropriateness of which, as applied to this state, will be fully appreciated, when we reflect that in their resources and necessities, Illinois and Iowa, are almost twin sisters. Both alike are agricultural states—both alike have large and extensive prairies—and are alike destitute of timber, as compared with the eastern and older states of the Union.

Says TRUMBULL, J., in delivering that opinion: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common law rule prevails now, it must have prevailed from the time of the earliest settlement of the state, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them, and adopted as applicable to their condition, a rule of law, requiring each one to fence up his cattle? that they designed the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government, was able to inclose his part with a fence? This state is unlike any of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet, before our extensive prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law, so inapplicable to the condition of our country and the people, as the one which is sought to be enforced now, for the first time, since the settlement of the state. It has been the custom of Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies, for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground, is universally conceded. No man has questioned this right, although hundreds of cases must have occurred, where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken; and never till now, has the common law rule, that the owner of cattle is bound to fence them up, been suffered to prevail, or to be applicable to our condition. The universal understanding of all classes of community, upon which they have acted by inclosing their crops, and letting their cattle run at large, is entitled to no little

consideration in determining what the law is; and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common law rule to the condition and circumstances of our people, that it does not, and never has, prevailed in Illinois."

The learned judge then proceeds to show, that it is not necessary to assume that ground in the case before him, for the reason, as he says, that their entire legislation, clearly shows that this rule of the common law never prevailed in that state. In like manner, we now propose to refer to some of our own legislation: which we think, will clearly show, that it was never supposed to prevail in this state. And in doing so, we shall confine ourselves to the Code and the laws passed subsequent thereto; for up to that time, we believe it to be conceded, that this rule of the common law did not obtain in Iowa.

Chapters 52 and 53 of the Code, relate to the rights and duties of adjoining owners, in building and keeping up partition fences, and the right of a party to recover damages, where the trespassing animal enters upon the injured land, from an adjoining close. Nothing is said as to the duty of the party to keep a fence against trespassing animals, *not* upon an adjoining inclosure. Neither by the Code, have we any definition of a lawful fence. The only provision that seems to bear upon the question, is to be found in section 114, which gives the county judge the power to submit to the people of his county, the question, "whether stock shall be permitted to run at large, or at what time it shall be prohibited?"

By chapter 105, Laws of 1853, however, a *lawful fence* is particularly described and specified. And this chapter has, beyond doubt, reference to the outside fences of an inclosure, as contradistinguished from the partition fences which are provided for by the Code. Any comment upon the object and purpose of this statute, we will reserve until we have referred to others, which we think have a legitimate bearing upon the question before us. Chapter 104 of the same laws, relates to the taking up of "water crafts, lost goods, and es-

trays." In section 8 of this act, is found this language: "Provided, that nothing in this act shall be so construed as to authorize any person to take up or stop any estray animal, between the first day of May, and the first day of November, unless the same be a work beast, and manifestly straying from its owner." In 1851, an act was passed, submitting to the people of the counties of Scott, Cedar, and Jones, the question, whether swine and sheep, or either of them, should or should not run at large within those counties. The election was to be held by ballot, and if a majority of the votes cast in either of said counties, should be either "swine not at large," or "sheep not at large," or both not at large, *then* the owners thereof were required to *restrain the same from running at large;* "and in the event of a failure so to do, he shall be liable for any and all damages done by his swine and sheep, or either of them, so running at large, to be recovered by action of trespass, by the party injured." Laws of 1851, chap. 33. At the same session, a similar act was passed, "restraining swine from running at large in Jackson county." Chapter 73, 173. In 1855, we find an act "prohibiting certain male stock from running at large." By this act, it is provided, that no stallion, or jack, bull, boar, or ram, shall after the taking effect of the same, be allowed to run at large; and any person aggrieved, is authorized forthwith to restrain such animal, and give immediate notice thereof to the owner, and if the owner of such animal, after being notified, shall refuse to keep up or prevent such animal from running at large, he is subject to a fine not exceeding five dollars, for every such offence. Laws of 1855, chap. 135.

This brief reference to these several acts, must be sufficient, in our opinion, to satisfy any mind that the legislature never understood that the rule of the common law prevailed in this state. We do not maintain that these provisions expressly change the common law rule. And did we believe that this principle had, at any time, been well established in this state, we should perhaps hold that it had not been changed by these different statutes. Where, however, it is to say the

least, doubtful, whether the rule contended for, is in accordance with our situation, condition, and wants as a people—where for a series of years there has been no legislation recognizing the existence of such a rule—and where custom and habit have uniformly negatived its existence, we feel entirely justified in giving force to these acts, which if they do not expressly, certainly do impliedly, change the unwritten law.

Let us ask, upon what other fair hypothesis it is, that a reason can be found for the passage of these several acts? If the common law rule, requiring the owner to keep up his stock prevails, or has prevailed, in this state, where the necessity or propriety of this legislation? What object could there be in defining a lawful fence, if no man is required to inclose his cultivated lands? If no fence is required to keep out stock, why so particular in saying what shall constitute a lawful fence? Again, if no stock are allowed to run at large, why is it that an estray animal, other than those of a certain kind, cannot be taken up for six months of each year? Can any person for a moment believe, that the legislature could have contemplated that it was contrary to law for such animals to be out of an inclosure, and at the same time pass an act, that they should not be taken up for half of each year?

And again, if the common law rule prevails, why pass two several acts, authorizing the people of Jackson, Jones, and other counties, to determine by an election, whether certain animals should, or should not, run at large—and in those acts provide, that if the majority decided *against* these animals running at large, then the owners were to restrain the same, but make no provision that the owners were to be liable, if the majority should be the other way? If they were bound to restrain the same any how by the general law, why these special statutes? And with how much force does the argument derived from these laws, apply to the case before us, which arose in Jones county, one of the counties named in the act of 1851? Why pass this law for the benefit of the county, if already the general law was, as is claimed by

the appellant? But once more; if all stock is to be kept inclosed, what necessity was there for the act of 1855, prohibiting certain male animals from running at large? According to appellant's argument, they were not allowed, and this law was therefore unnecessary. We cannot believe that all these acts were passed without an object. We are bound to believe, that the legislature acted with reference to the law as it stood, and that they understood it to be, that stock might lawfully run at large, and that the owner thereof was not liable for any injury sustained, unless the person injured had an inclosure—an inclosure made by a lawful fence. And in the language of the case from Illinois, before quoted, "if there ever was a case where cotemporaneous construction and acquiescence, could be properly resorted to, for the purpose of ascertaining the law, this is surely that case, both as regards the right of stock to run at large, and the necessity for fencing against them." And if, in the language of MASON, C. J., in *Hill* v. *Smith et al.*, Morris, 70, custom can, when long acquiesced in, recognized, and countenanced by the sovereign power, repeal, as well as make laws, then it certainly may change a principle of the common law. And especially so, when the legislature, by the enactment of statutes, recognizes by implication at least, a rule that is clearly at variance and incompatible with the former one, or the one existing at common law.

Judgment affirmed.

[GORDON *v.* THE STATE OF IOWA.

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Unless it is clearly shown that the discretionary power granted to the District Court, in applications for a change of venue, by section 3272 of the Code, has been improperly exercised, the appellate court will not interfere with the decision.

Under section 3039 of the Code, which provides that a defendant may be found guilty of any offence, the commission of which is necessarily included in that which is charged in the indictment, a party indicted for murder, may be found guilty of manslaughter.

Where in a criminal case, the defendant offered a witness, who proved the general good character of the defendant, as a good, quiet, and peaceable citizen; and where the state was permitted, on cross-examination, to ask the witness, if he knew of instances in which the prisoner had been engaged in difficulties with individuals, to which question the defendant objected; and where the state was permitted to show by the witness, instances of difficulties by the prisoner, with others; *Held*, That the court erred in permitting the evidence to go to the jury.

To show that the answer of a witness to an improper interrogatory, disclosed improper testimony, it is not necessary that such answer should be set out in words. It is sufficient, if it satisfactorily appears, that he testified of, and detailed matters which ought not to be inquired of, and ought not to be considered by the jury.

Error to the Lucas District Court.

THE defendant was indicted in the county of Monroe, for the crime of murder. At the next term, the said defendant, owing to the prejudice and excitement against him in the county of Monroe, had the venue changed to the county of Lucas. The cause being thus transferred, he at the first term of that court, applied for a change of venue to another judicial district, based upon an affidavit, that he could not before that court, receive a fair and impartial trial, owing to the prejudice of the judge there presiding. This application was overruled, and the prisoner put upon his trial. During his trial, it appears that defendant introduced a witness, by whom he proved, his general good character as a good, quiet, and peaceable citizen. After which, the state on cross-examination, asked the witness if he knew of instances in which

the prisoner had been engaged, or had had difficulties with individuals; to which question the prisoner objected, and his objection was overruled by the court, and the state was permitted to go into an examination of particular instances of difficulties by the prisoner with others, "to which ruling prisoner excepted." It is further shown, that the court instructed the jury that under the said indictment, they could find the prisoner guilty of manslaughter, to which instruction he excepted. A verdict of guilty of manslaughter was returned; motions in arrest and for a new trial overruled, and the prisoner sentenced to the penitentiary for three years, and adjudged to pay a fine of one hundred dollars. To reverse this conviction, he prosecutes this writ of error.

H. D. Ives, for the plaintiff in error, made the following points:

1. The verdict of the jury was contrary to law. The indictment must charge but one offence. Code, §§ 2917 and 2918. Upon an indictment for murder, the jury may find defendant guilty in the second degree. Code, 2569. What the verdict should be. Code, § 2571. Manslaughter is another offence. Code, § 2576. The defendant had a right to know the crime charged against him, and specifically. Constitution of Iowa, §§ 10 and 11; Const. United States, §§ 5 and 6; Walker's Int. to Am. Law, 444.

2. The motion for a change of venue, was improperly overruled. Code, 456.

3. The court permitted improper evidence to go to the jury. 1 Phil. Ev. 469; 2 Roscoe's Crim. Ev. 97; *Commonwealth* v. *Hardy*, 2 Mass. 317; Whart. Crim. Law, 295; *State* v. *Canton*, 15 New Hamp. 169; 1 Chitty's Crim. Law, 574; 2 Russ. on Crimes, 786; 2 Carter, 96.

Samuel A. Rice, (Attorney-General), and *Knapp & Caldwell*, for the state.

1. Under section 3272, of the Code of Iowa, for change of venue, on account of the prejudice of the judge—if the court re.use to grant such change—such ruling of the court below

cannot be reviewed in this court. *Spence* v. *State*, 8 Blackford, 282; *Boswell* v. *Flickheart*, 8 Leigh, 364: 5 U. S. Dig. Venue, § 24; *Goraway* v. *Smith*, 3 Humph. 154; *Findley* v. *State*, 5 Blackf. 576; *Millison* v. *Holmes*, 1 Smith, (Ind.) 55; 10 U. S. Dig. Venue, § 4; 1 Harrington, 382; 5 Ib. 582.

2. A party on cross-examination, can examine as to particular facts, to show the witness's means of information, and this applies to criminal as well as civil cases. 1 Greenl. Ev. §§ 431, 446; 3 Ib. §§ 23, 24.

3. The cross-examination is a matter to be regulated by the discretion of the court, under all the circumstances of the case. 1 Greenleaf's Ev. §§ 431, 447, 449; 2 Cow. & Hill's Notes, note 370; 1 Greenleaf's Ev. 446, 448; 17 Pickering, 490, § 498.

WRIGHT, C. J.—In this court, the plaintiff in error relies upon three grounds: First. That the court erred in refusing the change of venue. Second. In permitting the witness to be cross-examined as to particular instances of difficulties on the part of the prisoner, with other persons. Third. In instructing the jury that they could find him guilty of manslaughter. The question presented by the first assignment, was before this court in the case of *Trulock* v. *The State*, 1 Iowa, 515. It became unnecessary then, to determine it, however, that judgment being reversed on other grounds. It being again presented in a very similar case, we proceed to dispose of it. The Code, chapter 204, after giving the prisoner the right to petition for such change, and reciting what such petition must contain, provides, (section 3272,) "that such court, in *the exercise of a sound discretion*, may grant such change of venue; and if the same is prayed on the ground of objection to the judge, such change must be awarded to some convenient county or adjoining district; or if such change is prayed for on the ground of excitement and prejudice in the county, such change must be awarded to the nearest and most convenient county, where such prejudice and excitement do not exist." With this discretion, we do not think we can interfere, unless it is clearly shown

to have been improperly exercised. There may be cases in which the action of the judge will manifest an abuse of this discretion, clearly developing and establishing his prejudice, and under such circumstances, safety to the citizen, and the integrity of the law, would compel a review. Nothing of the kind is shown in this case, however. There is nothing to satisfy us, that the court below exercised any other than a sound discretion, and in such cases, we have no power to control its exercise. There is, it is true, an apparent impolicy or inconsistency, in allowing a tribunal charged with prejudice, to judge of its presence or absence. But this, if a fault, is a fault of the law, and one that we cannot remedy. This conclusion is sustained by the construction given to similar statutes in other states. *Findley* v. *The State*, 5 Blackf. 576, under the statute of 1838, which used the words, "at its discretion;" *Spencer* v. *The State*, 8 Ib. 281, under a statute which used the words, "fair and sound discretion;" *Millison* v. *Holmes*, 1 Smith, (Ind.) 55; *Boswell* v. *Flickheart*, 8 Leigh, 364; and see Humph. 154; 1 Harrington, 382, and 5 Ib. 582. The case of *McGoon* v. *Little*, 2 Gilm. 42, and *Barrows* v. *The People*, 11 Ill. 121, were decided under a statute which left no discretion in the court.

We next examine the objection to the instruction given by the court. It was held in the case of *Benham* v. *The State*, 1 Iowa, 542, that under an indictment for maiming or disfiguring, the prisoner might be convicted of an aggravated assault and battery; referring to the Code, which provides that a defendant may be found guilty of any offence, the commission of which is necessarily included in that which is charged in the indictment. Section 3039. This rule, we think, is decisive of the question here presented. The prisoner was indicted for the crime of murder, and under such an indictment, we have no doubt but that he may be found guilty of any offence necessarily included in that charged. That at common law, the defendant might have been convicted of manslaughter, where the indictment was for murder alone, is not denied; and with what show of reason it can be claimed that this rule is changed by the Code, we cannot

perceive. We are referred to § 2918, which provides that on an indictment for a public offence, admitting of different *degrees*, the defendant may be convicted of such offence, or any degree lower than that charged in form in such indictment. And in connection with this, counsel cites sections 2569, 2570 and 2571, which define murder in the first and second degrees, and require the jury upon the trial of an indictment for murder, if they find the defendant guilty, to inquire and by the verdict ascertain, whether he be guilty in the first or second degree. The argument attempted to be drawn is, that these directions or requirements are restrictive upon the power of the jury, and that they cannot proceed further, and inquire whether any other offence has, or has not, been committed; but that under an indictment for murder, the prisoner must be acquitted, unless the crime in the first or second degrees, is sustained by the proof. In this construction we cannot concur. If this view is correct, then section 3039 has no meaning, when applied to an indictment for murder. The other view, gives significance to section 2918, and recognizes the right to convict for any offence in the *second* degree, though the indictment in form charges it in the first degree alone. And it also gives force and meaning to section 3039, which refers not to different degrees of the same offence, but rather to a state of case where the proof shows the commission of an offence necessarily included in that charged, though it may not be a different degree of the same offence. As to this particular offence, for instance, while homicide is the genus of murder, manslaughter is a species; and by section 2918, there may be a conviction of the second degree, when the first alone is charged; and under section 3039, there may be a conviction for the species, (manslaughter), or any other offence necessarily included in the charge of murder. On this subject, see the following cases, decided upon statutes containing similar provisions: *State* v. *Fleming*, 2 Strob. 464; *King* v. *The State*, 5 How. (Miss.) 730; *Watson* v. *The State*, 5 Miss, 497; *Plummer* v. *Same*, 6 Ib. 231; and Bishop's Cr. Law, § 538.

It only remains to inquire, whether it was correct to per-

mit the state, on cross-examination of a witness who was called as to the good character of the defendant, to go into proof of particular acts or difficulties on his part? And in permitting this, we think the court erred. It is true, that in the cross-examination of witnesses, the court in the exercise of its discretion, may permit great latitude, but we apprehend that it cannot be so far extended, as to allow the introduction of illegal and improper testimony. The rule permitting this latitude, is rather for the purpose of testing the memory and credibility of the witness, than to enable a party to get before the jury testimony which would be inadmissible, if offered in a direct examination of his own witness. In this case, it appears, that the defendant sought to prove his general good character, as a quiet and peaceable citizen. This he had a right to do. The prosecution then, against his objections, asked the witness if he knew of instances in which defendant had been engaged in difficulties with individuals, and the state was permitted to go into an examination of particular instances of difficulties with others. This would have been clearly improper, if offered by the state as direct testimony, and we cannot conceive it to be any less so, from the fact that it was drawn out on cross-examination. It is evidence of *character*, which is admissible, which of course is to be confined to the trait of character which is in issue, or, as it is expressed by some of the writers, the evidence ought to have some analogy and reference to the nature of the charge. But the evidence must be confined simply to the general character or reputation, and neither can ask questions as to particular facts or difficulties. 1 Chitty's Crim. Law, 574; *Egleman* v. *The State*, 2 Carter, 97; 2 Russel on Crimes, (3d ed.) 704; *The State* v. *Rentar*, 15 N. H. 169; 1 Phillipps Ev. 469, 470, and notes, 319, 320, 321; Roscoe's Cr. Ev. 97, 98. It is insisted, however, by the state, that though the question may have been improper, the record does not disclose that improper testimony was elicted, from the fact that the answer of the witness is not given. We think that to sustain this position in this case, would be extending the rule referred to, too far. To show that the an-

swer of a witness to an improper interrogatory, disclosed improper testimony, it is not necessary that such answer should be set out in words. It is sufficient, if it satisfactorily appears, that he testified of and detailed matters which ought not to be inquired of, and ought not to be considered by the jury in finding their verdict. The record in this case shows, that the "*state was permitted to go into particular instances of difficulties by the prisoner with others.*" It would be difficult to show more clearly, what was proved, without setting out the language of the witness, which we do not think is strictly necessary.

Judgment reversed and cause remanded, with instructions to award a trial *de novo.*

DIXON *v.* THE STATE OF IOWA.

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Where a party charged with a criminal offence, is under arrest, or has given bail, he is required to make his challenge to the array of the grand jury, before the indictment is found.

Where a defendant in a criminal case, filed two pleas in abatement of the indictment, which alleged that the grand jury which found the bill, was not appointed, drawn, or summoned as required by law, and setting out the alleged defects, which pleas, on motion, were struck from the files of the court; and where it appeared from the record, that the defendant, prior to the finding of the indictment, was under arrest, and had given bail for his appearance at court at the term at which the indictment was found; *Held*, That the pleas were properly stricken from the files.

A person indicted for an assault, with intent to commit murder, may be legally convicted of an assault and battery.

Error to the Lucas District Court.

AT the September term, A.D. 1854, of the District Court in Monroe county, the plaintiff in error was indicted for an assault with intent to murder. On his petition, the venue was changed to Lucas county, where he was convicted of an assault and battery. The plaintiff assigns for error, certain

rulings of the court below, which will be found sufficiently stated in the opinion of the court.

J. E. Neal, for the plaintiff in error.

Samuel A. Rice, (Attorney-General), for the state.

WOODWARD, J.[1]—The first assignment of error is, that the court sustained the motion of the state, to strike from the files the defendant's second plea in abatement. This was a plea to the indictment, and was based upon the alleged ground, that the grand jury which found the bill, was not appointed, drawn, or summoned, as is required by law, and was not a legal grand jury, in consequence of certain omissions and neglect of the township and county officers. This objection is a challenge to the array, recognized in chapter 166 of the Code, §§ 2882, 2890. The defendant was under arrest, and had given bail for his appearance at that term; so we infer at least, with as much confidence as is possible in the imperfect and confused state of the papers. In other words, in the language of the Code, (§ 2882,) he was held to answer for a public offence. When the defendant is under arrest, or has given bail, he is to make his challenge to the array, before indictment found. See chapter 166. It is the intent of the statute, that he shall do this at as early a day as is practicable. And when he is already under arrest and present, it is in his power to do it before an indictment is found. *Norris' House* v. *The State*, 3 G. Greene, 513.

This reason covers also the second error assigned, that the court disregarded his first plea in abatement, which was of the same nature and substance. The third assignment of error is, that the court received the verdict and rendered judgment, without the defendant being arraigned and tried, and without a jury being impanneled, charged, and sworn.

[1] WRIGHT, C. J., having been of counsel, took no part in the decision of this cause.

The papers show that the defendant was arraigned; that he filed a written plea of "not guilty;" and that a jury brought in a verdict. We are not aware that it is essential to the validity of a verdict, that the record should give the names of the jurors. But however this may be, when what professes to be a record, comes up in so irregular and confused a condition as this is, and when nothing is shown to the contrary, this court will presume these things to have been done regularly; and this requires no violent presumption, when the record shows a verdict to have been rendered. The fourth assignment of error is, that being indicted for an assault with intent to murder, the jury could not legally render a verdict of guilty of an assault and battery. In the case of *Gordon* v. *The State*, *Ante*, 410, the defendant was indicted for murder, and was found guilty of manslaughter. This was held to be regular. The present cause comes within the same principle. The same was ruled in *The State* v. *Benham*, 1 Iowa, 542. The judgment of the District Court is affirmed.

PENLEY *v.* WATERHOUSE.

The doctrine that a subsequent promise will remove the statutory bar, obtains, not because statutes of limitations, either in this country or England, have so provided, but because such promises have uniformly been held to obviate the effect of such statutes.

Where in an action on a promissory note, the defendant pleaded the statute of limitations, to which the plaintiff replied, averring that since the first day of July, 1851, and before the commencement of this suit, the said defendant admitted that the cause of action still justly subsists, and that the said cause of action does in fact still justly subsist, which averments were denied by the rejoinder of the defendant; and where it did not appear affirmatively from the answer of the defendant, or from his testimony as a witness; and where the defendant asked the court to instruct the jury as follows: "That in order to entitle the plaintiff to recover on the ground, that the cause of action still justly subsists, the fact that it does justly subsist, must appear from the answer of the defendant, or from his testimony as a witness," which instruction the court refused to give, but instructed the jury, "that the issue formed

by the replication and rejoinder, was immaterial," in which instruction the counsel for the plaintiff acquiesced, and claimed nothing under that issue; *Held*, That under the circumstances, the defendant could not have been prejudiced by the refusal to give the instruction; and that it was not error to refuse it.

In order to revive a debt barred by the statute of limitations, it is not necessary that the promise to pay, should have been made *after* the debt was barred by the statute.

An admission that the debt is unpaid, or a promise to pay, made *before* the debt is barred, and while an action might be maintained upon it, is sufficient to remove the bar of the statute.

Where in an action on a promissory note, the statute of limitations was pleaded, to which the plaintiff replied, a subsequent promise, which was denied by the rejoinder; and where the defendant asked the court to instruct the jury as follows: "That a promise to pay, in order to revive a debt barred by the statute of limitations, must have been made *after* the debt was barred; and that a promise to pay, or an admission that the debt is unpaid, made *before* the debt was barred, and while an action might have been maintained on the note, will not be sufficient to revive the debt," which instruction was refused; *Held*, That the court did not err in refusing the instruction.

Section 1670 of the Code, which provides that causes of action founded on contract, are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same, is but declaratory of the common law rule, as it stood before the enactment of the Code.

Where in an action on a promissory note, the statute of limitations was pleaded, to which the plaintiff replied a subsequent promise, which was denied by the rejoinder; and where the defendant asked the court to instruct the jury as follows: "1. That under the statute of limitations of 1843, a mere admission of indebtedness did not revive a debt barred by the statute; and that if plaintiff relies on a mere admission that the debt is unpaid, such admission must have been made since the Code took effect, viz: July 1, 1851, to be binding on defendant, and entitle the plaintiff to recover. 2. That any admission contained in the letters of the defendant, dated June, 1848, and February 10, 1850, are not evidence in this action against the defendant, to show an admission that the debt is unpaid, or that the cause of action still justly subsists, for the reason that they were made prior to July 1, 1851, when the Code took effect and went in force," which instructions were refused; *Held*, That the instructions were properly refused.

The statute of limitations should not be viewed in an unfavorable light, or as a defence unjust and discreditable, but like all other statutes, should be so construed as to effect the intention of the legislature—that intention being to afford security against stale demands, after the true state of the transaction may be either forgotten, or rendered incapable of explanation.

A party may waive the bar created by the statute, and revive the cause of action, by a subsequent promise.

If this promise is conditional in its character, the plaintiff must show that the condition has happened, else the defendant is not liable.

The cause of action may be revived, not only by a promise to pay, but also by an acknowledgment of the debt.

If the acknowledgment only goes to the original justice of the debt, it is not sufficient; it must admit its present existence, or that it is due.

The terms of the acknowledgment or promise, are not material, if they clearly and unqualifiedly show a subsisting debt, for which the defendant is liable.

Where there is an acknowledgment of a present indebtedness, the law implies a promise to pay.

Such an acknowledgment, though ever so clear, will not be sufficient, if accompanied with an expressed intention not to pay, or with an intention to insist upon the benefit of the statute. If not accompanied by any such expression of intention, an acknowledgment is sufficient.

The expression of an inability to pay, coupled with an acknowledgment of the debt, does not destroy the acknowledgment, if it is otherwise sufficiently full and unqualified.

Where in an action on a promissory note, the defendant pleaded the statute of limitations, to which the plaintiff replied a subsequent promise, and that the defendant had admitted that the debt was unpaid, which was denied by the rejoinder; and where it appeared from the evidence that the defendant had used the following expressions: "I am disposed to pay my debts, if I had the means,"—"I formerly expected to pay what I owed, but I have not been so fortunate," &c.,—"I would not go to California, but for my eastern debts, and among others, I am indebted to the plaintiff,"—"I expect Penley out, and am selling this land to pay him;" and where it was left to the jury to determine whether these expressions were intended to refer to the debt on which suit was brought, who found for the plaintiff: *Held*, That these expressions were a sufficient acknowledgment or admission of the debt, to remove the bar of the statute; and that it was properly left to the jury to determine whether they applied to the debt on which suit was brought.

Where the question to be determined is one of *intention*, to be gathered from the language used, and from all the circumstances of the case, it is proper to leave it to the jury, under the instructions of the court.

When the promise or acknowledgment relates to a particular debt, the evidence of which is in writing, and is sufficient to revive it, the original claim, with interest, is *prima facie*, the amount due.

Appeal from the Linn District Court.

THE petition in this case, claims to recover on a promissory note, made at Portland, Maine, and dated October 8th, 1844, payable on demand, with interest. The suit was commenced July 9th, 1855.

The defendant, among other defences, pleads the statute of limitations. To this defence, plaintiff replied, *first*, that from the month of May, 1850, until February, 1853, defend-

ant was a non-resident of the state; and *second*, that defendant did within six years next before the first day of July, 1851, undertake and promise to pay said note, and did within that time and afterwards, and before the commencement of this suit, admit that the said note was unpaid, and that the cause of action still justly subsisted. To the first part of the replication, defendant rejoined, admitting his absence for the time stated, but averring that it was temporary, on business, and that his family and residence during all that time, were in this state; to this there was a demurrer, which was sustained, and from that question defendant appealed to the last term of this court, when the demurrer was overruled, and cause remanded. To the second part of the replication, defendant rejoined in denial of the promise and admission therein alleged, and upon this issue the parties went to trial.

To sustain the issue on his part, the plaintiff introduced the note sued on, and also certain letters written by defendant to plaintiff, and conversations had by defendant with different persons, the material parts of which are as follows:

In June, 1848, defendant wrote to plaintiff, saying, "I received your letters by the hand of Captain Jordan, and am sorry to have it to say, that I have no means to pay my debt. I am disposed to pay my debts, if I had means, but see no prospect, for I am quite infirm, and have hard work to get a living. I have been dunned by some of my eastern creditors, previous to receiving your letter, for there is a large amount that you did not get up, viz: (naming some debts), and if they were all offered to me for twenty-five dollars, I could not pay even that small sum, without taking from me the necessaries of life."

On the 10th of February, 1850, he writes: "Captain Penley, Sir, I received a line from you a few days since; in answer I have to say, that I cannot pay you anything at present, for I have been very unfortunate, having had much sickness in my family. You say you can sell the note there at a great discount. I am not able to purchase it at any rate, without depriving myself and family of the necessaries of

life, and (that) of course, you would not expect, and if you can sell it to any one there or here, you may. I should like to buy it, but see no prospect of canceling my paper."

To the introduction of these letters, defendant objected; because they were dated and written *before* the note sued on was barred by the statute, and before the taking effect of the Code, which objections were overruled and defendant excepted.

On the first of June, 1854, defendant again writes as follows: "Captain John Penley—Sir: I received a line from you a few days since, and in answer will say, that I formally (firmly or formerly) expected to pay what I owed, but I have not been so fortunate as I anticipated; that I have given up all hopes of being able to pay my debts. I went to California, and endured all the privations and hardships for three years, that I could; was sick and lame, and spent all I made. You insinuate that you know what I have, &c. I am entirely willing you should. I know I have not enough to live on comfortable, and as for adopting the bread and water regimen, you recommend, I do not see fit, having never recommended it to any one yet."

It was also proved that defendant, in the spring of 1850, when about starting for California, stated to witnesses, that he would not go but for his eastern debts, and named the plaintiff among the persons to whom he was indebted, and that he could not safely hold property in his own name. Another witness states, that in November, 1853, defendant acknowledged a deed before him, and said at the time, that he expected Penley out, and was selling the land to pay him. This witness also testifies, that defendant moved to this state in December, 1844. And this being all the testimony offered by either party, the defendant asked the court to instruct the jury as follows:

First. That under the statute of limitations of 1843, a mere admission of indebtedness did not revive a debt barred by the statute, and that if plaintiff relies on a mere admission that the debt is unpaid, such admission must have been made

since the Code took effect, viz: July 1, 1851, to be binding on defendant, and entitle the plaintiff to recover.

Second. That in order to entitle the plaintiff to recover, on the ground that the cause of action still justly subsists, the fact that it does justly subsist, must appear from the answer of the defendant, or from his testimony as a witness.

Third. That any admissions contained in the letters of the defendant, dated June, 1848, and February 10th, 1850, are not evidence in this action against the defendant, to show an admission that the debt is unpaid, or that the cause of action still justly subsists, for the reason that they were made prior to July 1, 1851, when the Code took effect and went in force.

Fourth. That a promise to pay, in order to revive a debt barred by the statute of limitations, must have been made *after* the debt was barred; and that a promise or admission that the debt is unpaid, made before the debt was barred, and while an action might have beeh maintained on the note, will not be sufficient to revive the debt.

All of which instructions were refused, and defendant excepted. The bill of exceptions shows that the court had previously instructed the jury, that the issue made by the pleadings as to the fact that the cause of action still justly subsists, was an immaterial one, and when the second instruction was asked by defendant on that point, plaintiff's counsel acquiesced in the disposition made of that issue, and claimed nothing thereon. The jury having returned a verdict for the plaintiff, the usual motions in arrest and for a new trial, were made and overruled, and judgment rendered on the verdict for the amount of the note and interest.

The defendant appeals, assigning in this court the following errors:

1. In admitting in evidence, the letters of defendant, dated June, 1848, and February 10th, 1850.
2. In refusing the instructions asked by appellant.
3. In overruling the motion for a new trial.
4. In rendering judgment against the appellant.

Clarke & Henley, for the appellant.

Three questions are presented in this case, for the consideration of the court, as follows:

1. Were the two letters of defendant properly admitted in evidence?

2. Were the instructions asked by defendant, properly refused?

3. Is there any evidence of a subsequent promise?

And we shall argue these questions in the order here presented.

I. The letters were improperly admitted in evidence. The note bears date the 8th of October, 1844, and suit could have been brought upon it at any time before the 8th of October, 1850. The statute of limitations could not have been pleaded until that date. This suit was commenced on the 19th of July, 1855. The first two letters offered in evidence to prove a subsequent promise, are respectively dated June, 1848, and February 10th, 1850, before the note was barred by the statute of limitations, and while an action could yet have been sustained upon it. In other words, until October 8th, 1850, the remedy was not suspended; and no promise was necessary, till after that time, to give life and vitality to the note, or set the wheels of litigation in motion. If then, either of these letters contain a promise to pay, or an acknowledgment of the debt, having been written before the note was barred, they are merely *nudum pactum*, destitute of a consideration, and cannot be enforced. A promise to pay a debt barred by the statute, or an acknowledgment of such a debt, is only upheld by the moral obligation that exists to pay the same. If the debt is not barred—if an action may still be sustained on the note—at the time the promise or acknowledgment is made, no such moral obligation exists, and the promise fails for want of a consideration to sustain it. If there is a legal liability to pay, when the promise is made, that promise can give no additional force to that liability. If there is no legal liability, then the promise or acknowledgment, is sustained on the ground of moral obligation. Where there is no mere moral obligation to give effect to

the promise, it is no more binding than any other promise, made without consideration. These views, we think, will be found to be sustained by the following authorities: *Danforth* v. *Culver*, 11 Johns. 146; *Hill* v. *Henry*, 17 Ohio, 9; *Ruff* v. *Ball*, 7 Harr. & J. 14; Chitty on Cont. 821; *Peyton* v. *Minor*, 11 S. & M. 148; Story on Cont. 1118, 1120. If these views are correct, the letters, if they prove anything, were improperly admitted in evidence.

II. We come now to the consideration of the instructions. The first instruction which the court refused to give, asserts a proposition which we believe to be legal. At common law, no lapse of time would bar the recovery of a debt. Limitations are purely statutory. If the statute provides that a subsequent acknowledgment, or a subsequent promise, shall remove the bar, then the courts possess the power to enforce the collection of the debt. If the statute contains no such provision, then the courts possess no power to enforce payment, even though there may have been a promise or acknowledgment. The whole proceeding being statutory, there is no power anywhere to go behind the statute. The old English decisions, by which the courts in their hostility to the statute, endeavored to abrogate it, are not law. Hence the statute of 21 James I, c. 16, was followed by 9 George IV, c. 14, which contains an express provision that a written admission of the debt within six years, was sufficient to obviate the statute. Following this statute, which sought to legalize the decisions of the English courts, it is believed, that the statutes of limitations of all the states, except the Iowa act of 1843, contain provisions reviving the remedy by a subsequent promise. The Iowa act of 1843, contained no such provision; and we hold, in the language of the instruction, that under that statute, a mere admission of indebtedness, did not revive a debt barred by the statute. This instruction, we think, should have been given.

The second instruction should have been given. It applies to and explains an issue presented by the pleadings. The replication alleges, that the defendant admitted that the debt, for the recovery of which this action is brought, was

unpaid, and that said cause of action justly subsists. This is denied by the rejoinder. Here is the issue. The Code provides that in actions founded upon contract, the above limitations shall not apply, if from the answer of defendant, or from his testimony as a witness, it appears affirmatively that the cause of action justly subsists. Code, 246. Upon this issue, it was our right to have an instruction—it was the duty of the court to inform the jury, that this issue could only be found for the plaintiff, from the answer of defendant, or his testimony as a witness—that it could be proved in no other way. This the court refused to give; but confused the jury, and prejudiced our rights, as the exceptions show, by telling the jury that this issue was immaterial, &c., which was not true by the way. The issue was submitted to the jury, and was material, and it was just as easy, and quite as proper, for the court to have given the instruction asked, or have refused it, on the ground that it was not law. The disposition the court made of the instruction, was erroneous. Our views upon the other two instructions, are presented above, and we need not repeat here.

III. The third interrogatory propounded above, is most material in this case—*is there any evidence of a subsequent promise, or any admission of the debt, from which such promise can be implied?* This leads us to a consideration of the testimony. Let us first, however, determine what the law is upon this point.

In *Lockhart* v. *Eaves*, Dudley, (S. C.) 321, it is held, that the acknowledgments and promises must specify or plainly refer to some *particular* demand or cause of action to be revived or created by them. In *Pray* v. *Garceton*, 5 Shep. 145, it is held, that a mere general admission by the party sought to be charged, that he was owing something to the plaintiff, *without stating how much, or for what*, is not sufficient to take the demand out of the statute. In *Fellows* v. *Guimarin*, Dudley, (Geo.) 100, it is said, that a promise sufficient to take a contract out of the statute, *must be express*, or an acknowledgment *so direct and explicit as to be equivalent* to a promise. These cases we find cited in 5 U. S. Digest, and

it is proper that we should say, that we have not been able to refer to the reports themselves. To the same purport are the following: *Allison* v. *Pennington*, 7 Watts & Serg. 180; *Allison* v. *James*, 9 Watts, 380; *Magee* v. *Magee*, 10 Watts, 172.

In *Robbins* v. *Farley*, 2 Strobh. 348, the law is laid down as follows: "Acknowledgments or promises, to obviate the statute of limitations, are not sufficient, unless they specify or plainly refer to some particular demand or cause of action to be revived or created by them." In *Clarke* v. *Dutcher*, 9 Cow. 674, it is held, that an acknowledgment must *clearly* refer to the very debt in dispute between the parties. In Story on Contracts, the law is laid down thus: "Such an acknowledgment must contain an unqualified admission of the debt, *and a willingness to pay it.*" Story on Cont. 1120, referring to *Clementson* v. *Williams*, 8 Cranch. 72. In *Martin* v. *Broach*, 6 Geo. 21, it is held, that an acknowledgment or promise to take a case out of the statute, must specify, or plainly refer to the particular debt, or demand, or cause of action, sought to be revived. In *Brailsford* v. *James*, 3 Strobh. 171, the acknowledgment of the defendant, was as follows: "Joe need not scruple about owing me the amount necessary for two courses of medical lectures, for I am owing him money on the trust estate, with interest from the day of settlement, and adding the interest, I owe him $300;" *held*, that these words were not sufficient to identify the debt sued on, so as to take the case out of the statute. In *Davis* v. *Steiner*, 2 Harris, 275, it is held, that to take a debt out of the statute, there must be a distinct acknowledgment of a particular debt, but its amount need not be stated. In this case, the words relied upon were these: Defendant said he owed plaintiff some money, and his son was in after it, and he was coming on to Greensburgh, to make arrangements to pay the money. In *Arey* v. *Stephenson*, 11 Ired. 86, it is held, that a debt will only be taken out of the operation of the statute, on a promise by the debtor to settle with a creditor, when it appears that the promise was made in regard to a particular debt. See also *Ventris* v. *Shaw*, 15 N. Hamp. 422; *Kensington Bank* v. *Patton*, 2 Harris, 479; *Grant* v. *Ashley*, 7 Eng.

762; *Brainard* v. *Buck*, 25 Vermont, 573; *Deloach* v. *Turner*, 6 Rich. 117; *Pool* v. *Relfe*, 23 Ala. 701; all of which sustain the doctrine that there must be, not only a specific admission of the debt sued on, but that it must be accompanied with a willingness to pay, or at least *not* an unwillingness to pay. In *Ayres* v. *Richards*, 12 Illinois, 146, the language relied upon was as follows: The witness called upon defendant, and showed him the account, and read over to him each item of the account, and as he read, Ayres admitted to the correctness of every item, and of the whole account, but as to the items for the board of his son, he stated that he thought that item, or a portion of it, had been paid by his son. He further stated that the account was correct, and that he would see Richards *and settle with him. Held*, to be insufficient, and the court says, that the promise may be implied from an unqualified admission that the debt is due and unpaid, *nothing being said or done at the time rebutting the presumption of a promise to pay.* These authorities might be multiplied, but it is sufficient to say, that the current of modern decisions are of the same tenor.

From these authorities, then, we may lay it down as settled law, that an acknowledgment to take the cause out of the statute, *must specify or plainly refer to the particular debt sued on, and must be accompanied with a willingness to pay.* Both of these things must concur—one is not sufficient, since courts have leaned *to*, rather than *against* the statute. Let us then try the evidence by this rule, and see what it amounts to. The only language in letter No. one, bearing upon this point, is the following:

"MAINE TOWNSHIP, February 10th, 1850.

"I have to say that I cannot pay you anything at present, for I have been very unfortunate, &c. * * You say you can sell the note there at a great discount. I am not able to purchase it at any rate, without depriving myself and family of the necessaries of life. * * * And if you can sell it to any one there or here, you may. I should like to buy it, but see no prospect of canceling my paper." Now, in the first

place, what note is here referred to? The note in suit? There is no evidence establishing that fact, nor is there any specific admission of this particular debt, as the authorities require. Again; the whole letter is to be taken together, and so far from showing a willingness to pay, the letter alleges that defendant cannot buy the note at *any price*, and closes with the assurance that defendant sees no prospect of canceling his paper. This certainly comes within the rule laid down in *Ayres* v. *Richards*, above cited; and from this letter no promise to pay, can be inferred certainly. In letter No. two, the language is as follows:

"JUNE, 1848.

"I have to say, that *I have no means* to pay my debts. I am disposed to pay my debts, if I had means, but I see no prospect, for I am quite infirm, &c. * * I have been dunned by some of my eastern creditors previous to receiving your letter, for there is a large amount that you did not get up, viz: Charles Ramstead, Boston, five to six hundred dollars, B. P. Pierce, N. H., two hundred dollars, and several others, and if they were all offered to me for twenty-five dollars, I could not pay even that small sum, without taking from me the necessaries of life."

We insist that there is nothing here that comes within the rule. There is nothing to identify the debt of the plaintiff—to show that it is the one in suit—and it shows an utter inability to pay. The defendant says in so many words, that I cannot pay my debts; I could not buy them all for twenty-five dollars, if they were offered to me at that price. If language like this, can be tortured into a promise to pay—either express or implied—then is the statute a farce.

The language of the *third* letter, which is *latest* in date, is still more explicit. Its words are these:

"JUNE 1st, 1854.

"I formerly expected to pay what I owed, but I have not been so fortunate as I anticipated. I have given up all hopes of being able to pay my debts. I went to California, and endured all the privations and hardships for three years that I could—was sick and lame, and spent all I made. * * I

know I have not enough to live on comfortable." In corroboration of this letter, is the testimony of the witness, McKinney, who says, that defendant remarked that he would not go to California, but for his eastern debts. The same witness further testifies, that the defendant named Penley as among his creditors. And Jordan testifies, that defendant said in 1853, when acknowledging a deed, that he expected Penley out, and he was selling the land to pay him. This is all the testimony. It specifies no particular debt—has no reference to the cause of action in this suit—the plaintiff fails to make it apply to the note in suit—and even though the whole testimony may possibly admit an existing liability to Penley on some account, or for some amount, the whole tenor and bearing of the evidence, so far from showing a willingness to pay, shows both an unwillingness and inability to pay. If this suit can be sustained on this evidence, then every creditor of defendant, upon these same letters and admissions, can likewise obtain judgment, for they are broad enough and wide enough, to apply to all. The evidence being insufficient to sustain the verdict, the court should have sustained the motion to set the same aside, and erred in overruling the motion.

George D. Woodin, for the appellee.

The first question raised by appellant is, were the two letters of defendant, properly admitted in evidence? It is contended that a mere promise, made *before* the cause of action is barred by the statute of limitation, is without consideration and consequently void, and for this reason it is claimed, that the first two letters written by defendant before the statute commenced running, were improperly admitted in evidence.

This, I think, is not the law. If it be true that an acknowledgment of indebtedness and willingness to pay, made while the legal liability existed, cannot be offered in evidence to show a new promise after the action is barred, then can a party be permitted to take advantage of the very forbearance by which he obtained time on his debt. Before the six years

expires, he acknowledges the indebtedness, says he is unable but willing to pay, and thereby induces the plaintiff to give him time on his demand; and after that indulgence has been given, *in consideration of the acknowledgment of indebtedness*, we are told that he should be permitted to take advantage of the plaintiff's forbearance to sue. The contrary, we think, is clearly shown in cases of *Austin* v. *Bostwick*, 9 Conn. 496; *Galliger* v. *Hollingsworth*, 3 Har. & McHen. 122; and *Coles* v. *Kelsey*, 2 Texas, 541.

But granting that appellant has stated the law correctly, we think there is sufficient evidence to show a new promise *made after* the action was barred by the statute. The third letter offered in evidence by plaintiff, was written by defendant, on the 1st day of January, 1856, in which he acknowledges his indebtedness; also says to the witness, Jordan, in November, 1853, "that he expected Penley out, and he was selling land to pay him." McKinney testifies, that in the spring of 1850, he heard defendant say, "that he would not go to California, but for his eastern debts, and that he named the plaintiff among the persons to whom he was indebted; that defendant said, he could not safely hold property in his own name." This must, at least, be considered as an acknowledgment of indebtedness. The acknowledgment made to *Jordan and McKinney, not parties*, is sufficient; 2 Greenleaf on Evidence, 441; Story on Contracts, 1014.

It is claimed, also, that it is not sufficiently certain to what debt the defendant referred, when he wrote the letters given in evidence, and when he admitted his indebtedness to plaintiff, in the presence of Jordan and McKinney. In the letters he refers to "the note," and if the reference was made to another than "the note," of plaintiff, the burden of proof was on defendant to show it.

But we think, a general acknowledgment of indebtedness is sufficient. In the case of *Whitney* v. *Bigelow*, 4 Pick. 110, it is held, that a general acknowledgment of indebtedness is *prima facie* sufficient to take a case out of the statute, and that the burden of proof rests on the defendant to show that

it referred to another claim. The same principle is recognized in 2 Greenleaf on Evidence, 441; Chitty on Contracts, 719, and held in *Coles* v. *Kelsey*, 2 Texas, 541; *Dinsmore* v. *Dinsmore*, 21 Maine, 437; *Barley* v. *Cram*, 21 Pick. 323; *Grey* v. *Laws*, 6 Gill, 87; *Bartholomew* v. *Bartholomew*, 22 Pick. 291; *Bird* v. *Gammon*, 3 Bing. 883, from all of which authorities, we see plainly, that when a general acknowledgment of indebtedness is made, the burden of proof rests on the defendant to show that it refers to different causes of action from the one on which suit is brought. Neither is it necessary, as claimed in defendant's argument, that the admission must state the precise amount due. Story on Cont. 1014.

In Chitty on Contracts, 719, referring to *Davis* v. *Steiner*, 14 Penn. 275; *Willis* v. *Wildman*, 18 Conn. 124; *Hazlebaker* v. *Reeves*, 12 Penn. 264, we find it laid down, that an acknowledgment of indebtedness from which a promise to pay may be inferred, is sufficient, although *the parties may differ as to the amount.* So also in Chitty on Contracts, 719, (note), and in *Woodbridge* v. *Allen*, 12 Metcalf, 470, we have it that, "it is not necessary in order to revive a debt barred by the statute of limitations, that any *specific sum* should be acknowledged to be due."

It is claimed, too, in the argument for defendant, that under the statute of 1843, an acknowledgment of indebtedness is not sufficient, unless accompanied by a *promise to pay.* We think that the jury, from the letters read in evidence, could easily have seen *an acknowledgment of the debt in terms so distinct as that a promise to pay could be inferred therefrom.* Chitty on Contracts, 719; *Moore* v. *Bank of Columbia*, 6 Peters, 86, and that an admission that a debt is due, is equivalent to a promise to pay the same.

WRIGHT, C. J.—Brevity may be consulted, by considering the errors assigned in this case, under two heads. *First.* Were the instructions asked, improperly refused? and if not, *Second.* Was the verdict warranted from the evidence? Before coming to the consideration of the first question, how-

ever, we propose to dispose of some positions assumed by appellant, which can hardly be said to be involved in the instructions asked.

He claims that the statute of 1843, contains no provision for reviving a debt by a subsequent promise, and that, therefore, such promise will not bind the defendant, so as to authorize the court to enforce the collection of the debt. We are not aware of any authority which will sustain this position. It has been uniformly held, that a debt may be thus revived, and yet, certainly, none of the earlier statutes, either in this country or England, contained such a provision. The statute of 21 James I, chapter 16, which our statute of 1843 followed, had no such provision; and yet it was never doubted but that a subsequent promise would, and did, take the debt out of its operation. The subsequent promise is a new evidence of the debt, and being proved, will maintain the action. It is to be considered as a new promise, founded upon the previous debt as a consideration, and supports the action, independent of the original promise—a new agreement founded upon the original consideration. *Bell* v. *Morrison*, 1 Pet. 360; 4 Bacon Abrig. 483. And another view of it is, that such promise is a waiver of the statute, or the bar created by the statute, just as a party may waive any other right, privilege, or defence he may have under the law. *Bangs* v. *Hall*, 2 Pickering, 368. The lapse of time, or the statute, does not extinguish the debt, but bars the remedy; and this remedy thus barred, may be revived by the subsequent promise, though the statute may make no such provision.

None of the authorities cited by appellant, as far as we have been able to examine them, sustain his position. The statute of 9 Geo. IV, chapter 14, referred to, certainly does not aid him. That statute only provides, (so far as material to be here considered), that the subsequent promise or admission, should be in writing. It only changed the manner of proving the promise, but by no means tends to establish the proposition, that before that statute, a verbal promise would not have been sufficient to take the debt out of the

operation of previous statutes of limitations. Chitty on Contracts, 818; 14 Pickering, 388. In short, we may say, that the doctrine that a subsequent promise will revive the statutory bar, obtains, not because statutes of limitation, either in this country or England, have so provided, but because such promises have uniformly been held to obviate the effect of such statutes.

In considering the instructions asked by defendant, we will first direct our attention to the second, as that appears to have been refused for reasons that apply to it alone. The Code, (§ 1661,) enacts that the limitations provided for in the previous section of the chapter, shall not apply to actions founded on contract, if from the answer of the defendant, or from his testimony as a witness, it appears affirmatively that the cause of action still justly subsists. The plaintiff, in his replication to the plea of the statutes of limitations avers, that since the first day of July, 1851, and before the commencement of this suit, the said defendant admitted that the said plaintiff's cause of action still justly subsisted, and also avers, that the said cause of action does, in fact, still justly subsist. These averments are distinctly denied in the rejoinder. In view of this section of the Code, it appears, that the court instructed the jury that the issue so made by the replication and rejoinder, was immaterial, and plaintiff's counsel acquiesced in this disposition, and claimed nothing by that issue. Under such circumstances, was it error to refuse the defendant's second instruction? We think not. We are unable to see how he could possibly be prejudiced by such refusal. There was no claim by plaintiff, that defendant had, either by his answer, or his testimony as a witness, admitted that the cause of action still justly subsisted. Under the circumstances, these averments in the plaintiff's replication, if material, could avail nothing; and that issue having been entirely withdrawn from the jury, it was unnecessary to give any instruction on the subject.

We next inquire, whether the fourth and last instruction, was properly refused? The appellant, by his instruction, claims, that to revive a debt, the promise to pay must have

been made *after* the debt is barred by the statute; and that a promise to pay, or an admission that the debt is unpaid, *before* it is barred, and while an action might be maintained, is not sufficient. We think that reason, as well as authority, justified the court in refusing this instruction.

Let us briefly consider the reasonableness of this instruction. Suppose that before the debt is barred, the creditor is induced to forbear prosecuting it, by the continued promises of the debtor to pay. Thus influenced, the creditor delays until the statute applies, dating from the maturity of the debt or note. After this, the debtor refuses to promise, and when sued, claims that his continued promises shall not avail, because they were made before the debt was barred, and when he might have been sued, and but for which he would have been. According to this rule, does he not take advantage of that forbearance, by which he obtained time on his debt—a forbearance too, extended in consideration of his promises or admissions that the debt was unpaid. And it is to be recollected, that if the appellant's position is true, then it applies to a written promise or admission made before the debt is barred, as well as a verbal one. For one argument used in this part of the case is, that such a promise is only applied by the moral obligation that exists to pay the debt, and that if the debt is not barred at the time such promise is made, no such moral obligation exists, and the promise therefore fails, for the want of a consideration to sustain it. If this argument is sound, then, we repeat, it could make no difference that the promise was in writing, for it would fail for want of a consideration to support it, as would the verbal promise. But it is difficult to see the force of such an argument. Why there is not as much moral obligation to pay the debt before, as after, it is barred, we cannot perceive. It is said there is a legal obligation to pay, before it is barred, and we ask why is this not sufficient to support the promise, and especially, if we have superadded the moral obligation. The new promise before the debt is barred, may not give any additional force to the legal liability to pay—but it may continue that liability longer than it would have continued, but

for such promise. There is as much to support the promise in one case, as in the other, and if either promise has the better consideration to support it, it is certainly not the one made after the debt is barred.

Neither do the authorities cited, sustain the appellant's position. In Chitty on Contracts, 821, referred to, it is said, that although the statute of limitations bars the remedy after six years, the debt is not extinguished; it still exists, and the debtor is still under moral obligation to discharge it. He may, therefore, by a new promise to pay the debt, revive the original liability. So in Story on Cont., 1st ed. § 706, it is said that the operation of this statute may also be frustrated, by an acknowledgment of the existence of the debt, or by a new promise to pay it. This promise or acknowledgment, is considered as a new promise, founded upon the previous debt as a consideration, and must be sufficient in itself to support an action for the debt, independent of the original promise. But neither of these authors intimate that the promise would not be sufficient, if made before the debt was barred.

Nor can appellant claim to be aided in this position by the cases of *Danforth* v. *Culver*, 11 Johns. 146, and *Hill* v. *Henry*, 17 Ohio, 9. The latter case turned for the most part, upon a peculiar statute of Ohio, and that it in no manner determines the question now under consideration, is sufficiently shown by the concluding part of the opinion. "Upon mature consideration," says HITCHCOCK, J., in delivering the opinion, "we conclude that under the limitation laws of this state, the acknowledgment and promise to pay a debt which is barred by the statute, does not revive the original cause of action, but if a creditor would enforce collection, he must do it by suit on the subsequent promise." The case in 11 Johns. 146, does nothing more than recognize substantially the same doctrine as above quoted from Chitty and Story on Contracts.

The first and third instructions asked, present substantially the same questions, and may appropriately be considered together. And that question briefly stated, is, whether

the Code, by section 1670, does more than declare the law as it stood before its enactment? We think the determination of this question, and especially, if determined in the negative, disposes of all the matters contained in the two instructions as asked. For it is evident, that if the admissions in said instructions referred to, would have been sufficient to take the debt out of the bar of the statute, before the taking effect of the Code, then we need not consider whether that section would or would not have a retroactive effect. This section of the Code, provides that causes of action founded on contract, are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. Does this do anything more than to declare the common law rule? We conclude not.

From the time of the passage of the first statute of limitation in England, it has been uniformly held, that a new promise to pay the debt, would have the effect of taking the case out of the statute. What should be the character of that promise—whether it should be clear, explicit, and express, or whether the promise might be inferred from slight circumstances—will be found to be much controverted. When, however, it was attempted to avoid the effect of the statute, by proof of the acknowledgment of the debt, without any proof of a promise to pay, more difficulty and doubt arose. It was at one time held, that the acknowledgment, without a promise to pay, would not be sufficient. Afterwards, we learn, the acknowledgment of a debt was evidence from which a jury would be warranted in inferring a promise to pay, but was not a matter, if specially proved, on which a court would give judgment for plaintiff; and afterwards their courts went so far, as to hold that the slightest word of acknowledgment would take the case out of the statute. See 11 Johns. 146, and the cases there cited. And we may add, that the decisions in England, show that at first, their courts hesitated in departing from what was regarded as the positive language of the statute, in admitting that an acknowledgment of the debt should take a case out of its operation. But that, having once given such an effect to an acknowl-

edgment, these courts went to the other extreme, and permitted the slightest acknowledgment to revive the debt; in effect holding that the statute was entitled to no respect, and that such defences should not be encouraged. We have an instance of this, in the case of *Quastock, assignees, &c. v. England*, 5 Burr. 2630, where Lord MANSFIELD is reported to have said, "that the slightest acknowledgment is sufficient to take the case out of the statute;" and again, "that in honesty, a defendant ought not to defend himself by such a plea."

Some of the courts in this country, have followed these extreme cases, and manifested a like disposition to deny to the statute, any force or efficacy. This disposition is not general, however; and indeed we may say, that the tendency now is, not to explain away the statute, but to give it the same force and respect, which is given to any other statute. And the same is true of the English cases, even before the passage of the act of 9 Geo. IV, above referred to. Hence it may be now said to be well settled, that in order to take a case out of the statute, there must either be an *express promise*, or the acknowledgment of a *subsisting debt*, from which a promise of payment may be inferred. If, however, the debt shall be acknowledged ever so clearly, and the debtor expresses an intention not to pay, there can be no recovery. This is the repeated and express ruling in New York. *Allen* v. *Webster*, 15 Wend. 284; *Sands* v. *Gelston*, 15 Johns. 511; *Danforth* v. *Culver*, 11 Ib. 146; and so it is ruled in Massachusetts. *Bangs* v. *Hall*, 2 Pick. 368; *Munford* v. *Freeman*, 7 Metc. 432; *Sigourney* v. *Drury*, 14 Pick. 390; *Bailey* v. *Crane*, 21 Ib. 323. This latter case refers to the one in 2 Pick. 368, and says that the doctrine there laid down, has been tested by experience, and is undoubtedly sound and wise; and that it has everywhere been acknowledged as sound law. That case decided, that to take a debt out of the statute, there must either be an express promise to pay, or *an unqualified acknowledgment of a present indebtedness. In the latter case, the law will imply a promise to pay;* and so the case in 14 Pick. *supra*, says, that such new

promise may be expressed or implied, and a jury will be authorized and bound to infer such promise, from a clear, unqualified, and unconditional admission of the existence of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations.

And the same rule would seem to be recognized in the Supreme Court of the United States, and in most of the states. *Wetzell* v. *Bussard*, 11 Wheat. 309; *Moore* v. *Bank of Columbia*, 6 Pet. 92; *Bell* v. *Morrison*, 1 Pet. 361; *Cromwell* v. *Buckman*, 7 Blackf. 587; *Exeter Bank* v. *Sullivan*, 6 N. H. 132; *Perley* v. *Little*, 3 Greenleaf, 97. In the case of *Wetzell* v. *Bussard*, 11 Wheat. 322, Ch. J. MARSHALL, uses this language: "It is contended on the part of the plaintiff, that he has proved an acknowledgment of the debt, and that such acknowledgment, according to a long series of decisions, revives the original promise, or lays a foundation on which the law raises a new promise. The English, as well as American books, are filled with decisions which support this general proposition. An unqualified admission that a debt is due at the time, has always been held to remove the bar, created by the statute." And in *Scaper* v. *Tatton*, 16 East, 420, Lord ELLENBOROUGH says: "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant, that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid be shown, it does away with the statute." In *Read* v. *Wilkinson*, 2 Wash. C. C. 514, it is held, that if the offer of the debtor, on a fair interpretation, amounts either to a promise to pay, or to an acknowledgment of the debt, or some debt, it is sufficient to remove the bar of the statute. And again, it has been ruled, that from a general acknowledgment, where nothing is said to prevent it, a general promise to pay, may and ought to be implied; but where the party guards his acknowledgement, an implication will not arise. Chitty on Contracts, 821 and notes.

Leaving adjudicated cases for the present, let us see what

is said by the text writers, as to the effect of an acknowledgment and a promise to pay. And as before remarked, it is clearly agreed, that if the debtor acknowledges the debt, and promises to pay, this revives it, and brings it out of the statute. So also it has been held, that a bare acknowledgment of the debt, within six years of the action, (under the statute of James,) is sufficient to revive it, and prevent the statute, though no new promise was made. 4 Bacon's Abrig. 483. This dictum, it will be observed, goes further than the more recent cases in this country, so far as the use of the term *bare* is concerned. But as here used, we give it but little weight, the proposition being clear, that an acknowledgment is sufficient. So in Angell on Limitations, 228, it is said, that it is not necessary that the promise should be express; it may be raised by implication of law, from the *acknowledgment* of the party, it being borne in mind, that this acknowledgment must not only go to the original justice of the claim, but admit that it is *still due*. See also in this connection, *Clementson* v. *Williams*, 8 Cranch, 72; and *Whitney* v. *Bigelow*, 4 Pick. 110, where it is said, that no set form of words is requisite; it may be inferred from facts, without words. Also see 2 Greenleaf's Evidence, §§ 440, 441. In Story on Contracts, § 706, it is said, as before shown, that the operation of the statute may also be frustrated by an acknowledgment of the existence of the debt, or by a new promise to pay it. And in section 707, he says, if there be no express promise to pay, a promise may be raised by implication of law, from the acknowledgment of the party. But such an acknowledgment, he adds, must contain an unqualified admission of the debt, and a willingness to pay it. An acknowledgment of the original justice of the claim, is not sufficient, unless accompanied with an admission of the party's present liability. And see on this subject 2 Parsons on Contracts, 347.

We have been thus full in referring to the authorities at this time, because they will serve to aid us, when we come to consider the second error assigned, as well as show, by a series of decisions, the law as applied to the question now

before us—and from these decisions, we deduce the following, among other propositions:

That the statute of limitations should not be viewed in an unfavorable light, or as a defence unjust and discreditable; but like all other statutes, should be so construed as to effect the intention of the legislature, that intention being to afford security against stale demands, after the true state of the transaction may from a variety of causes, be either forgotten, or rendered incapable of explanation.

That a party may waive the bar created by the statute, and revive the cause of action, by a promise to pay.

That if this promise is conditional in its character, the plaintiff must show that the condition has happened, else the defendant is not liable.

That the cause of action may be revived, not only by a promise to pay, but also by an acknowledgment of the debt.

That if this acknowledgment only goes to the original justice of the debt, it is not sufficient; but it must also admit its present existence, or that it is due.

That the terms of the acknowledgment or promise, are not material, if they clearly and unqualifiedly show a subsisting debt, for which the defendant is liable.

That when there is an acknowledgment of a present indebtedness, the law implies a promise to pay.

That such acknowledgment, though ever so clear, will not be sufficient, if accompanied with an express intention not to pay, or of an intention to insist on the benefit of the statute. But if not accompanied with any such intention, an acknowledgment is sufficient.

Let us now apply these propositions, as far as relevant, to the present question. The section of the Code, before cited, provides that causes of actions founded on contract, are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. This section must be construed with reference to the law, as it stood prior to that time. We do not understand that the admission that the debt is unpaid, would be sufficient, if accompanied with a

denial of the original justice of the demand, or any other language that indicated that there was a valid defence to it—the admission should not negative the fact that the debt justly subsists. Nor do we suppose, that it would be necessary that the debtor should say in so many words, that the debt was unpaid. But if, when his language is fairly construed, such an admission can be satisfactorily and clearly shown, it will be sufficient. And what is this admission, but an acknowledgment of the debt? The debt, we must bear in mind, is not extinguished by the bar of the statute. It still exists. The promise, or acknowledgment, or admission, does not create the debt, but revives it and continues it, so to speak, in law; and when the defendant, under the Code, admits that the debt is unpaid, he makes in effect neither more nor less than an acknowledgment from which the law implies a promise to pay, supported by the original consideration. In short, this was one of the methods in which a debt might have been acknowledged, so as to revive it before the Code took effect, and yet not the only method. The defendant might say, "I acknowledge your claim; your debt was and is just, and ought to be paid; I acknowledge that payment has been delayed too long, and I must pay it;" or use like language. And yet all such expressions are but acknowledgments or admissions of a continuing or existing liability to pay; but would not amount to what is termed an express promise to pay. And finally, how can the debtor acknowledge the debt, without admitting it to be unpaid; and how can he admit it to be unpaid, without acknowledging it? Does not the term acknowledgment in this connection, necessarily include the admission provided for in the Code, as one of the methods of acknowledging the debt; and does not such an admission amount to an acknowledgment, and can it be fairly said to be any more or less?

With this view of the law as it stood before the adoption of the Code, we have no hesitation in saying, that the instructions based upon the supposed change, were properly refused. And we therefore need not discuss the other positions which have been suggested; and these are: *First.*

Whether, if this section of the Code did change the previous law, it does not apply alone to the remedy, and in no manner to the contract, and might not therefore have a retrospective operation, and affect and control admissions previously made? And *Second.* Whether the instructions were not properly refused, for the reason that the defendant's admissions, as proved since the taking effect of the Code, were sufficient to sustain the verdict, and that, therefore, the previous admissions were entirely immaterial? We need intimate no opinion as to the first question. The consideration of the second, will be necessarily to some extent involved in determining the last question in the case, to which we now come; and that is, whether the verdict and judgment were justified from the evidence?

And we acknowledge that the question is not free from difficulty. There is no pretence for claiming, that the debt was revived by an express promise to pay. If revived, it is upon the grounds that he has acknowledged the debt, or admitted it to be unpaid. Counsel for appellant, urge that this acknowledgment is not sufficient, for several reasons; and we perhaps, cannot better present the view entertained by us on this part of the case, than by briefly examining these reasons. It is first claimed, that the evidence shows an unwillingness on the part of the defendant to pay the debt; or at least, does not prove an express willingness to pay. Without referring to the letters in detail, we think they do prove a willingness to pay. It is true, that defendant does refer to, or speak of, an inability to pay, and indeed his poverty would appear to be that which he most strongly urges upon the plaintiff, to induce him to not urge payment. But an expression of inability, can hardly be said to amount to an expression of unwillingness, in the sense that this latter term is used in the books. Unwillingness is disinclination, reluctance to do a particular thing; and yet there may be an inclination, desire, or readiness to do that which a party is unable to do. And so on the other hand, there may be the ability, without the inclination, or indeed coupled with a positive disinclination. An unwillingness to

pay, results or rather arises, from mere objection to the debt, founded either upon circumstances transpiring at the time of the contract, or subsequent; and necessarily imports something different from an inability to pay. The expression of unwillingness, is held to defeat the promise or acknowledgment, upon the ground that it negatives the just existence of the debt. The recognition, as we have seen, must be clear and unqualified, and it is said this cannot be, if an unwillingness to pay is manifested. But on the other hand, the expression of an inability, in no manner takes from the acknowledgment, if it is otherwise sufficiently full and unqualified. If it appeared that the condition upon which he promised was an ability to pay, the question would be different. But as presented, we conclude that the expression of an inability, cannot amount to an unwillingness. But further, we think, as already stated, that defendant does express a willingness to pay—among other the following expressions are used by him in his letters and conversation: "I am disposed to pay my debts, if I had the means; I formerly expected to pay what I owed, but I have not been so fortunate, &c.; I would not go to California, but for my eastern debts, and among others, I am indebted to plaintiff;" and again, in December, 1853, when acknowledging a deed, for a parcel of land, which he had sold, he said he expected plaintiff out, and was selling this land to pay him. All of these expressions clearly manifest a willingness to pay plaintiff, and it would be doing violence to language certainly, to hold that they showed an unwillingness. And to our minds the fair conclusion to be drawn from all this testimony is, that defendant was willing to pay, and acknowledged the correctness of plaintiff's claim, but urges his poverty and afflictions as reasons why he is unable.

Concluding, therefore, that there is not only the absence of an expressed unwillingness, but proof that he expressed himself willing to pay; and that in this respect the testimony was sufficient, we next consider the second objection urged. And that is, that there is not sufficient to show that the ad-

mission or acknowledgment had reference to this particular debt.

We are aware that on this subject the authorities are far from being uniform. The courts in Massachusetts, and other states, have held, that a general acknowledgment of being indebted to the plaintiff, is sufficient *prima facie* to take the demand sued on out of the statute; and that the *onus* lies on the defendant, to show that his acknowledgment had reference to a different demand. *Whitney* v. *Bigelow*, 4 Pick. 410; *Bailey* v. *Crane*, 21 Ib. 323; *Woodbridge* v. *Allen*, 12 Met. 470; *Gray* v. *Jarvis*, 6 Gill, 82. In other states, it has been held, that the acknowledgment must be so precise and definite in its terms, as to show that the debt sued on, was the subject matter of it; and that the acknowledgment of a mere general indebtedness, is not sufficient. *Moore* v. *Hyman*, 13 Ired. 272; *Harbold* v. *Kuntz*, 16 Penn. 210; *Clarke* v. *Dutcher*, 9 Cow. 674.

In this case, it does not appear that any instructions were asked or given on this particular question. It would appear to have been left to the jury to determine, whether the defendant intended to acknowledge this particular debt. And to this course, we can see no good objection. It does not seem to be entirely settled by the authorities, whether the sufficiency of the acknowledgment in all respects, to remove the bar of the statute, is to be determined by the court or jury. When the question is one of intention, however, to be gathered from the words used, and from all the circumstances of the case, we believe it to be proper to leave it to the jury, under the instructions of the court. 2 Parsons on Contracts, 348; Angell on Limitations, § 238. Here no proof was made that any other debt existed, that might have been referred to in the letters and conversations. Under such circumstances, what objection can there be to leaving it to the jury to determine, whether defendant had reference to this debt? Was it not as legitimate a subject for their consideration and determination as any other question of fact? Did the defendant refer to this note in his letters and conversation? was the question, and this question, we think,

was properly submitted to the jury. In such cases, it is the duty of the court to instruct the jury as to the principles of law applicable, and by which they must be governed in their determination. For instance, they might be advised, that if the acknowledgment was general, and it appeared that two or more debts existed, the *onus* was thrown upon the plaintiff to clearly and fully satisfy them, that the debt sued on, was the one intended. If, on the other hand, the proof satisfied them that the debt sued on, was the only one between the parties, then such acknowledgment would be sufficient, without referring to the debt, by date, amount or description. And again, that if there was an absence of proof as to any other debt, they were to judge from all the circumstances, whether the acknowledgment had reference to the claim which was the subject of the suit, it being borne in mind, that the jury must in all cases, be satisfied that the defendant at the time he made the acknowledgment, intended to refer to the claim sued, and not another. And, finally, that in all such cases, the burthen of proof is on the plaintiff, to show that the acknowledgment had reference to the claim which he sets up, and unless he does clearly so satisfy them, their verdict should be for defendant.

Believing that this question was properly left to the determination of the jury, the remaining inquiry is, whether they were justified in finding as they did from the testimony. And we certainly cannot conclude that this verdict was so far against the weight of evidence, as to authorize a new trial. To sustain the verdict, we have, first, the fact that no proof is made of the existence of any other debt. In the next place, in his letter of February, 1850, he distinctly refers to the debt which he was owing, as "the note," and when we consider further, that in all the correspondence and defendant's conversations, he makes no reference to plaintiff's having more than one demand, but at different times speaks of making efforts to pay plaintiff, we think the jury might reasonably have concluded that defendant did refer, and intended to refer, to this particular debt.

But it is claimed, that the acknowledgment was indefinite

as to the amount owing. If, however, the note sued on, was the one referred to, it becomes *prima facie* evidence of the amount of the debt. Where the promise or acknowledgment relates to a particular debt, the evidence of which is in writing, as a promissory note, and is sufficient to revive it, the original note, with interest, is *prima facie* the amount due. In short, when thus revived, (the acknowledgment or promise not fixing a definite amount,) the note becomes the evidence of the amount, subject to any offsets, payments, or the like, just as if suit had been brought on it before it was barred. We conclude, therefore, that the court did not err in refusing the instructions asked; that the verdict was warranted from the evidence; and that the motion for a new trial, was properly overruled.

Judgment affirmed.

SCOTT, for the use of BOLENBAUGH *v.* GRANGER.

Where in an action for money had and received by the defendant, for the use of the plaintiff, the petition alleged, that the money was paid to the firm, of which defendant was the survivor, for the purpose of entering a certain parcel of real estate, for which the plaintiff obtained the receipt of the firm, stating the amount of money, and describing the land to be entered; that the firm undertook and agreed to enter the land, without delay; that they failed to do so, but kept and used the money as their own; that relying on the promises of the said firm, and being assured by defendant, that the land had been entered as agreed upon, the defendant, for plaintiff, conveyed said land, by deed in fee simple, in plaintiff's name, to one B. for a valuable consideration; and that since that time, one G. had entered the land; and where the defendant demurred to the petition, for the following causes: 1. The petition does not show that plaintiff is a party to the original contract, or the assignee thereof; 2. The petition shows that B. has an adequate remedy against S. under his deed, and no right of action against defendant; 3. The plaintiff does not show that he has been dispossessed of the premises, or that the conveyance made him by S. has been questioned; 4. The deed from S. to B. is not set forth, nor is it alleged to have been a warranty deed; and where the demurrer was sustained by the court, and the suit dismissed; *Held*, 1. That the demurrer misapprehended the nature of the action, and the parties thereto; 2. That to bring the suit *for the use of B.* it was not necessary to assign

the receipt to him; nor was it material to consider his remedy against S.—whether he had been dispossessed—nor whether his title had been questioned; 3. That the demurrer was improperly sustained.

Appeal from the Polk District Court.

THE petition in this case, avers that Scott deposited with, or paid to the firm of Granger & Reynolds, (the defendant being the survivor), a sum of money, for the purpose of entering a certain parcel of real estate, for which he obtained their receipt, stating the amount of money, and the land that was to be entered; that they agreed and undertook to enter the same, without delay; that they failed to do so, however, but with the intention of defrauding and injuring plaintiff, kept and used said money as their own. Plaintiff also states, "that relying on defendant's promise as aforesaid, and being answered, (assured?) by defendant, that the land had been entered as agreed, the said defendant, for plaintiff, did convey said land by deed in fee simple, in plaintiff's name, to one Jacob Bolenbaugh, for a valuable consideration;" and that since that time one Griffith has entered said land. To this petition there was a demurrer, for the following causes: *First.* Petition does not show that plaintiff is a party to the original written contract, or the assignee thereof; *Second.* The petition shows that Bolenbaugh has an adequate remedy against Scott, under his deed, and no right of action against defendant; *Third.* Plaintiff does not show that he has been dispossessed of the premises, or that the conveyance made by Scott has been questioned; *Fourth.* The deed from Scott to Bolenbaugh, is not set forth, nor is it alleged to have been a warranty deed. This demurrer was sustained, and the plaintiff not amending, the suit was dismissed, and he appeals.

Jewett & Hull, for the appellant.

Barlow Granger, pro se.

WRIGHT, C. J.—This demurrer appears to have misap-

prehended the nature of the action, as also the parties thereto. It assumes that Bolenbaugh is the plaintiff, and suing in his own right. He does not claim to be the party to the original contract, or that the same has been assigned to him. But Scott, who brings the suit, was the party to whom the receipt was given, and with whom the contract to enter was made. And though Bolenbaugh may have an adequate remedy against Scott, that does not relieve defendant from his liability on his contract, nor is it any reason why Scott may not sue for the use of Bolenbaugh, or any other person that he may name. There is no pretence from the petition, that plaintiff has ever been in possession of the premises, or that he has ever held any title to be questioned or doubted. On the contrary, the *gravaman* of his action is, that defendant did not enter the land, so as to give him title, and the consequent possession, or the right thereto. Then where the necessity for his averring that he had been dispossessed, or that his title had been questioned, when he makes neither of these the ground of his claim for damages? Nor was it necessary to set out the deed to Bolenbaugh, nor is its character of any importance in this suit. As between Scott and Bolenbaugh, it may be material, and will measure their rights and liabilities; but this suit is not brought on any covenants therein contained. This action is between Scott and defendant, and is brought upon a contract to which they were parties, and not upon a contract between Bolenbaugh and defendant, or between Bolenbaugh and Scott. To bring the suit *for the use of* Bolenbaugh, it was not necessary to assign the receipt, or original contract to him; nor is it material to consider his remedy against Scott,—whether he has been dispossessed, nor whether his title has been questioned. The claim made, is that defendant received Scott's money, and undertook to enter certain land; that he did not enter the same, but appropriated the money to his own use, by which plaintiff has been damaged. How far his damage may be affected, by the fact that he conveyed the premises to Bolenbaugh, relying upon defendant's representations that the land had been entered, is a question not now arising. We

only determine, that the demurrer was not well taken. Whatever other questions there may be in the case, must remain for disposition, until they shall present themselves in the further progress of the case. See *State, for use, &c.*, v. *Butterworth*, 2 Iowa, 158.

Judgment reversed.

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WILSON *v.* RALPH AND VAN SHAICK.

The indorser of a promissory note not negotiable, is liable to a suit by the holder thereof, without demand upon the maker, and notice of non-payment.

Section three of the act entitled "An act relating to evidence," approved January 24, 1853, has not changed the rule on this subject.

Appeal from the Linn District Court.

THE appellants, Ralph and Van Shaick, executed their promissory note to Wilson and Neely, for the sum of $220; who assigned the same to the plaintiff. The note not being paid at maturity, Wilson brought suit upon it against the makers and indorsers. The note was payable to Ralph and Van Shaick, without words of negotiability. The petition does not allege any demand by the plaintiff, upon the makers of the note, nor any notice to assignors of its non-payment. The defendants, Wilson and Neely, demurred to the petition, and allege as ground of demurrer, that the petition does not show that the note sued on, was ever presented for payment to the makers, nor that payment was refused by them. The court overruled the demurrer, and the defendants failing to answer further, judgment for plaintiff was rendered, to which defendants excepted, and appeal to this court.

George D. Woodin, for the appellants.

I. M. Preston, for the appellee.

STOCKTON, J.—The only question raised by the defendants in this cause is, whether the indorser of a promissory note not negotiable, is liable to a suit by the holder, without demand upon the makers, and notice of the non-payment?

The same question has been decided in New York, by the Supreme Court of that state, in the case of *Seymour* v. *Van Slick*, 8 Wendell, 421. It was there held, that the indorsement is equivalent to the making of a new note; it is a guaranty that the note will be paid; it is a direct and positive undertaking on the part of the indorsers, to pay the note to the indorsee; and not a conditional one to pay if the maker does not, upon demand, after due notice. The court further say, that the indorser in such a case, is not entitled to the usual privilege of an indorser of negotiable paper. He stands in the relation of principal, and not surety to his indorsee, and has no right to insist upon a previous demand of the maker, and notice of non-payment.

Under the Code of Iowa, (§ 949,) a non-negotiable note may be assigned, and the assignee has a right of action thereon, against the maker in his own name. Yet by section 956, the assignor of such a note, is liable to the action of his assignee, without notice of non-payment. Has the statute, in dispensing with this notice, excused the holder also, from the necessity of a demand of payment of the makers? In Parsons on Contracts, 232, it is said, "when a demand is requisite, a waiver of demand should operate as a waiver of notice; for if demand of payment is not made, because unnecessary, a notice can hardly be necessary or useful. But a waiver of notice alone, is not a waiver of demand, for though the party waiving, may not wish for a notice of the non-payment, he may still claim that payment should be demanded." 1 Parsons on Contracts, 232. This must be taken, however, to apply to negotiable paper, where a demand is necessary upon the maker or acceptor, and where the contract on the part of the indorser, is that the maker of the note will, upon due presentment, pay it at maturity; and that if it be not paid by the maker, that he, the indorser, will upon due and reasona-

ble notice of the dishonor, pay the same to the holder. Story on Promissory Notes, § 135.

In a note not negotiable, it will be seen, as stated above, that the undertaking of the indorser is entirely different. He has no right to insist upon a previous demand upon the maker. The holder may write an absolute guaranty over his indorsement, upon which a recovery may be had against him. 12 Johnson, 159. He is liable to a suit by the holder without any demand.

Has this rule been changed by section 3 of the act of 1853? Session Acts, 188. By that act, grace is allowed on bills and notes executed or payable within the state, changing the law as it existed under the Code. Section 957. We do not, however, understand the section of the act referred to, as requiring notice of non payment to be given by the holder of a promissory note, in any case where it was not before required by the rules and principles of the commercial law. According to the views which we have intimated above, as to the right of an indorser of a non-negotiable note, the indorser of such a paper was not before the passage of the act, entitled to notice of non-payment, and he is placed in no better condition by the act of 1853.

The judgment of the District Court will, therefore, be affirmed.

Judgment affirmed.

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RING *v.* ASHWORTH *et al.*

A court of equity possesses jurisdiction to correct a mistake in a written contract, and then to decree a specific performance of the contract as corrected.

The admission of parol evidence to show fraud or mistake in a written contract, forms an exception to the general rule, which excludes such evidence to control or vary a written contract.

While such proof is admissible, it is equally true that the mistake must be made entirely clear, and established by the most satisfactory proof.

A complainant in chancery, may ask for the correction of a mistake in a written contract, and that it be specifically enforced, when so corrected.

A party *seeking* a specific performance of a written agreement, stands in no different position as to his right to have a mistake in the contract corrected, than a party *resisting* such specific performance.

Where in a proceeding to enforce the specific performance of a contract to convey real estate, it appeared that the land was described in the contract as follows: "fifty-nine 87-100 acres of land, being so much of the west half of the northeast quarter of section twelve, in township eighty-one, north of range six of the fifth principal meridian;" and where it was objected that the contract was void, for uncertainty in the description of the land; *Held*, That the description was not so uncertain as to render the contract void.

Appeal from the Clinton District Court.

THIS is a bill in chancery by the vendee, seeking to reform, and also to compel the vendor to specifically perform, a written contract for the conveyance of certain real estate. The respondents demurred to the bill, for the following reasons:

1. That the court had no jurisdiction to correct the mistake in the contract, and then decree a specific performance of the contract, when so corrected.

2. That the description of a part of the land, was so indefinite, that no particular tract of land is, or can be, designated by metes and bounds.

The demurrer was sustained, and the complainant refusing to amend his bill, the same was dismissed. The complainant appeals.

Leffingwell & Cotton, for the appellant.

The right of a court of equity to correct a mistake in a contract for the sale of land, and enforce a specific performance, according to the original intention of the parties, is fully recognized by the authorities. Story's Equity, § 160; Adams' Equity, 260, and notes; *Bradford* v. *Union Bank*, 13 Howard, U. S. 57; *Wall* v. *Arlington*, 13 Geo. 88; *Gillespie* v. *Moore*, 2 John. Ch. 144; *Bellows* v. *Stone*, 14 N. H. 175; *Staplybun* v. *Scott*, 13 Ves. 425. And when by a part performance, the contract has been executed, all the authorities agree that this right vests in the court. *Woollam* v. *Hearn*,

2 Leading Cases in Equity, part 1, 571; Adams' Equity, 260, and note.

The objection that one piece of land is indefinitely described, cannot prevail. This 59 37-100 acres, was the vendor's entire interest in the eighty acre tract of land which is accurately described according to the government survey, and if some other person held the balance of that tract of land, as tenant in common with Ashworth, is it not proper for Ashworth to sell his interest in that tract of land? Again, if Ashworth owned the whole eighty acre tract, could he not sell the complainant the undivided three-fourths of it? It seems to us too obvious for argument, that he could.

The rule of construction of deeds, is laid down in *Boardman et al.* v. *The Lessees of Ford et al.*, 6 Peters, 345, as follows: "If the lands granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void. The meaning of the parties must be ascertained by the tenor of the writing, and not by looking at a part of it; and if a latent ambiguity arise from the language, it may be explained by parol." If this be the correct rule, the plaintiff's bill should not have been dismissed, but the ambiguity as to the interest sought to be conveyed to complainant in the eighty acre tract of land, could have been by him shown by parol to have been an undivided interest of 59 37-100 acres, in said accurately described eighty acres, which said eighty acre tract, is the least known legal subdivision which will answer the call for 59 37-100 acres, and which is the only fair, legal construction, which can be placed upon the contract.

Whitaker & Grant, for the appellees.

This was a bill in equity to correct a mistake in a written contract, to convey certain pieces of land, and to specifically enforce the contract as corrected. The defendant demurred to the bill on two grounds:

1. A court of equity had no jurisdiction to correct a mistake in a *contract*, and then enforce it, as corrected.

2. Because as to one of the tracts of land, there was no description definite enough to describe the land.

On the first point, the appellants refer to *Bradford* v. *Union Bank*, 13 Howard, 57. No such point arose in the case. *Wall* v. *Arlington*, 13 Georgia, 88. This was to correct a mistake in a *deed*. *Gillaspie* v. *Moore*, 2 John. Ch. 585; *Bellows* v. *Stone*, 14 N. H. 175. This was to correct a mistake in a mortgage, a deed. In fact, it was a bill to redeem a mortgage. *Napoleon* v. *Scott*, 13 Vesey, 425. This authority is on our side of the case. What is said by KENT, in *Gillespie* v. *Moore*, is *obiter*. The question was not before the court.

The authorities in England show one unbroken stream, that there is a difference between a party seeking, and a party resisting a specific performance. And in the case of *Woollam* v. *Hearn*, 7 Vesey, 211, cited and commented upon, in 1st part 2 White & Tudor's Equity Cases, 510, it is laid down, that a plaintiff cannot show a parol variation of a contract to convey, and then have equity to enforce it, because it is against the statute of frauds for him to do so.

"By the rule of law," (Leading Cases, 514 top, 361 margin,) "independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written agreement does not contain the real agreement, would be to receive it for every purpose. It was to shut out this inquiry, that the statute of frauds was adopted." To the same point, are *Higginson* v. *Clowes*, 15 Vesey, 516; *Clinan* v. *Cook*, 1 Sch. & Lef. 38, 39; *Clowes* v. *Higginson*, 1 Vesey & B. 524; *Winch* v. *Winchester*, 1 Ib. 375; *Clarke* v. *Grant*, 14 Vesey, 519; *Rich* v. *Jackson*, 6 Ib. 335; *Brown* v. *Clancey*, 4 Black. 514; *Ogilvie* v. *Foljambe*, 3 Merivale, 53, 63; *Townsend* v. *Stangroom*, 6 Vesey, 328; *Baker* v. *Paine*, 1 Ib. 457; *Gordon* v. *Uxbridge*, 2 Maddox, 106; *Allyland* v. *Sitnell*, 1 Younge & Collyer, 559, 582; *Maurer* v. *Bach*, 6 Hare, 443; *Nurce* v. *Lord Vernon*, 13 Beavan, 254. In *Allyland* v. *Sitnell*, 1 Y. & C. 582, the judge says: "I confess I should have great difficulty in holding this could be done, because I cannot help feeling,

that in case of an executory agreement, first to reform and then to decree an execution of it, would be virtually to repeal the statute of frauds."

In all the American cases, where the question was properly before the court, the same decision, for the same reason, has been made. *Brooks* v. *Wheelock*, 11 Pickering, 439; *Osborne* v. *Phelps*, 19 Conn. 63; made after Judge KENT'S *obiter* in *Gillespie* v. *Moore*, and STORY'S approval; *Westbrook* v. *Harbem*, 2 McCord's Eq. 112; *Miller* v. *Chitwood*, 1 Green. C. 199; *Best* v. *Stone*, 2 Sand. Ch. 298, a recent decision in New York; *Elder* v. *Elder*, 10 Maine, 80, which reviews *Gillaspie* v. *Moore*. The note of Hare in *Woolam* v. *Hearn*, is very able and deserves examination.

The citation of the other side, about part performance, is erroneous, both as to page and principle; the page is 518 top, 366 margin, right column near the bottom, and is this: "Where, however, a parol *variation* has been *part performed*, a specific performance of the written agreement, with the variation, will be decreed." Here lies the reason of the decisions of equity in correcting mistakes in deeds—because the vendee has possession of the land intended to be conveyed. In the case at bar, the part performance was on the written agreement, not the parol variation. We think this question would have more properly arisen on an answer, but as the plaintiff knew the defendant would deny any mistake, we adopted this mode to hasten a decision.

One word as to the demurrer for want of description. The authority cited is so strongly against the plaintiff, that we shall not trouble the court with others. Will the counsel on the other side, tell us what part of eighty acres is "59 37-100," acres,—where does it lie? in the north part, the south part, the east, or west? Where does the boundary begin, and where end?

WRIGHT, C. J.—Two questions are presented in this case. Complainant alleges in his bill, that one parcel of the land sold him by respondents, was by mistake misdescribed in the written contract. He therefore prays, that this mistake

may be corrected, and that respondents may be decreed to convey the parcel intended and designed to be sold, which is specifically set out. In the argument, the parties have treated this averment as denied by the answer, and the question made is, that a court of equity has no jurisdiction to correct a mistake in a contract, and then decree its specific performance as corrected.

On this question, the authorities are not uniform, but we think the better reasoning is in favor of the prayer of this bill, and against the position assumed by respondents. The general rule, that excludes parol evidence to vary or control written contracts, is well understood. Where, however, the terms or stipulations of a contract have been procured, suppressed, or omitted, by fraud, or imposition, courts of equity have not hesitated to grant relief, notwithstanding that to admit parol proof of such suppression or omission, may be said to violate the general rule upon which parol evidence is excluded.

To allow the fraud and imposition to be thus proved, however, is regarded as a proper exception to the general rule; for the rule and exception are alike founded upon that principle, which would "suppress frauds and promote general good faith and confidence, in the formation of all contracts." To reject such evidence entirely, would be to allow the general rule, which was designed to suppress *fraud*, "to be the most effectual promotive and encouragement of it." And upon the same ground it is, that equity interferes in cases of mistake.

"A court of equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake, to *resist* the claims of justice, under the shelter of a rule formed to promote it. In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all

cases, to vary written contracts." Cases of fraud and mistake, then, properly form exceptions to the general rule, which excludes parol evidence to control or vary the written contract; and though exceptions, they stand upon the same policy as the rule itself. But while such proof is admissible, it is equally true, that the mistake must be made entirely clear, and established by the most satisfactory proof. In the *Marquis of Townsend* v. *Stangroom*, 6 Vesey, 328, Lord ELDON said, that he owned that those who undertook to rectify an agreement, by showing a mistake, undertook a task of great difficulty, but he could not say that such evidence was incompetent. And in *Gillespie* v. *Moore*, 2 Johns. Ch. 596, the chancellor says, that "the cases concur in the strictness and difficulty of the proof, but still they admit it to be competent; and the only question is, does it satisfy the mind of the court?" And to the same effect, are the authorities generally. Story's Eq. Jur. §§ 152, 162 and note 1, to § 161; *Keiselbrack* v. *Livingston*, 4 Johns. Ch. 144; *Bradford* v. *Union Bank*, 13 How. 57.

Assuming then, that parol proof is admissible to show the mistake, is it competent for complainant to ask for such correction, and a specific performance of the contract? It is said in the argument, that the rule is different where a party is *seeking*, from what it is when he is *resisting*, a specific performance, and this distinction appears to be recognized by the English authorities. And it is therefore claimed, that while the respondent may be allowed to show in defence that there was a mistake in the written agreement, and thus resist the specific performance as prayed; and while equity might for him, reform and correct the contract, whether the alleged mistake was set up by answer or cross bill, yet the same relief will not be extended to the party who, as *complainant*, seeks similar relief. To our minds, there is no room for this distinction. So far as the introduction of proof to show mistake, may be said to violate the statute of frauds, it must be very evident that it can make no difference, whether it comes from the complainant or respondent. And the same is true, where the objection is that it tends to contradict or vary the

written agreement. There is certainly as much good sense and justice in saying, that a complainant shall have the right to insist upon the specific performance of his bond as written, without change, by the introduction of parol proof, as there is in giving to respondent such right, and denying it to complainant. And why, on the other hand, the complainant, if a mistake has occurred to his prejudice, may not set it up, when *seeking* relief, in like manner as the respondent may when resisting the relief, we cannot conceive. As we view the mutual rights of the parties in a court of equity, and the jurisdiction and duty of the chancellor, the distinction is narrow, and unsupported by either reason or justice.

It is said, that a court of equity is not like a court of law, bound to enforce a written contract; that it may exercise its discretion, and where a specific performance is sought, may leave the party to his legal remedy; and that, therefore, if the respondent by his answer, insists upon a mistake in the written agreement, the chancellor may correct it as claimed by him, and base his decree upon the agreement as thus corrected, rather than either dismiss the bill entirely, or grant the strict prayer of the bill, which appears by the answer and proof to be against conscience and justice. But, if equity will thus guard the respondent, when such decree would be inequitable, it would seem but reasonable, and a legitimate part of the same doctrine, that complainant should in like manner, be relieved against any mistake in the contract, and that relief granted him which may seem just and conscientious. It is not controverted, but that he might be relieved, by having a contract founded in mistake of material facts, set aside, canceled, or modified. But it is objected, that he cannot reform and so vary it by parol evidence, and then have it specifically performed, as thus varied and established. We think the doctrine is based, in most of the cases, upon the impropriety of admitting parol evidence to contradict a written agreement. And it is well said in the note to section 161, Story's Eq. Juris., that "this rule is not more broken in upon by the admission of it, for the complainant, than it is by the admission of it for the respondent. And

the same is true, where the objection is, that such proof, and the granting of such relief, is in violation of the statute of frauds; for it requires no argument to show, that it would be quite as inconsistent to allow the respondent to seek that shelter against a complainant seeking the specific performance of a contract, and the correction of a mistake, as to enforce a contract against a respondent, which embodies a mistake to his prejudice." Indeed, if the jurisdiction of courts of equity to reform written contracts, and to decree relief thereon, is once acknowledged, (as it is most clearly by the books), there is no principle upon which the cases, which make a distinction between the rights of complainant and respondent, can be supported.

It is also claimed by respondents, that the case of *Bradford* v. *Union Bank*, 13 Howard, 57, is not pertinent to the question before us. A brief reference to it, however, will show that it recognizes the rule contended for by complainant. Several of the English authorities are there cited, which are admitted to refer more particularly to the right of defendant, to have a decree for a specific execution of the agreement, according to the answer, so that he may be saved the expense of a cross bill, even against the claim of the complainant to have his bill dismissed. But, says the court, "the same principle seems to be equally applicable to the complainant, when he insists on the decree for a specific performance of the contract, as established by the proof, although different from that set up in the bill. Indeed, we perceive no valid distinction between the two cases. In both, the contract of course, when ascertained and conformed to the real understanding of the parties, must be such a one as the court deems fit and proper to be enforced,"—referring to 2 Danl. Pr. 1001, 1002; *London and Birmingham Railway Co.* v. *Trenton*, Craig & Phil. 62. This ruling goes even farther than is necessary for this case.

If a complainant may insist upon a specific performance of the contract, as established by the proof, although different from that set up in his bill, much more clearly may he do so, when he establishes by proof, that contained in the

bill, though that may vary from the one set out in the written agreement. And this right of the court, to reform the contract, and decree relief, extends to those which are executory, as well as those executed. "Hence," says Story, in section 159, Eq. Juris., "in preliminary contracts for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it, as reformed, if no conveyance or other solemn instrument, in pursuance of it, has been executed. And if such conveyance or instrument, has been executed, it reforms the latter also, by making it such as the parties originally intended." See also *Gillespie* v. *Moore*, *supra*, and the authorities there cited; and also, 4 Johns. Ch. R. 144; Story's Eq. Pl. § 394; *Warburton* v. *Lauman*, 2 G. Greene, 420.

The second, and only other question in the case is, whether the written contract, as to one parcel of the land, is void for uncertainty in its description? This tract is described as follows: "fifty-nine 37-100 acres of land, being so much of the west half of the northeast quarter of section twelve, (12), in township No. eighty-one, (81), north of range six, (6), of the 5th P. M." Counsel have argued this question very briefly, and cite but few authorities. We have, however, examined it with some care, and conclude, that for the purposes of this case, such description is not so uncertain as to render the contract, as to it, void. If this was an action of right, brought for a specific portion of this eighty, and plaintiff, to prove his title, had introduced his deed containing this description, the question, we think, would have been different. In that case, the court could not have ascertained from his deed, that he had title, to the identical portion claimed by his petition. And yet, between him and his grantor, the deed would have been sufficient to pass that amount of interest in the eighty acres. Under such a deed, as between them, he would have a *known interest* in said west half of the northeast quarter, &c. It might not be a known interest, in *exact location*, but definitely so as to *amount*. It would certainly have been as much so, as if his deed had said

one-third, one half, or two-thirds, of such eighty. Under such a deed, we cannot believe that the grantor could claim that his grantee had no title as against him. And if this be true, how is it different as between them, whether the deed describes the amount of interest in *acres*, instead of by fractional parts?

And when considered as an *agreement* to convey, between the parties to it, we think the question presents even less difficulty. As a starting point, we have in the contract a specified and known eighty acres, clearly described and located, a definite portion of which, in number of acres, respondents sell, and undertake to convey to complainant. There is, therefore, no difficulty in ascertaining where to find the land, for we know it is to be so much of the eighty acres. But, it is asked, from what part is this fifty-nine 37-100 acres to be taken? where will the boundary commence, at the east, west, north or south line, or at what corner of the eighty? For the purposes of this case, is it material to answer these inquiries, or does it necessarily follow that this amount is to be taken from any particular portion of the tract? Complainant purchased, and respondent undertook to make him a deed to, "fifty-nine 37-100 acres of land, being so much of the west half," &c. For anything that is shown, they may have owned an undivided interest to this amount in that tract; or they may have title to this extent, to a specific portion of it, and in either event, why should they not be decreed to convey it as required by their undertaking?

By their bond, they covenant that they have title to this number of acres in that eighty acre tract; in the same instrument they acknowledge the receipt of a portion of the purchase money; and how can they claim that the contract is void for uncertainty, when complainant insists that they shall be required to convey by the very description used in their contract? It seems to us, that it is not for them to avoid their undertaking, on any such ground, or that they should not object, while he only asks that they shall convey to him that interest in a certain tract of land, which they undertook to convey. After he obtains this title, it may be-

come a question between him and the person holding title to the remaining portion of the eighty, as to what part or portion each takes, and in that case the description used may become of more importance. He may have to institute further proceedings, by his suit for partition or otherwise, to settle and definitely fix his rights, but these are after considerations, in which these respondents, as far as we can see, have now no interest. At present, the complainant elects to insist upon a conveyance of the land, by the description used in the bond. This, we think, is his right.

Decree reversed.

CONGER *v.* DEAN.

An issue of fact raised by the pleadings, cannot be adjudicated on a motion to dismiss the cause.

A court is not bound to give irrelevant instructions, and their relevancy must be shown affirmatively, by the party complaining.

By the common law, parties may by parol, submit any matters in controversy between them to arbitration; and this right has not been taken away by the provisions of chapter 119 of the Code, which governs those awards which are designed to be reported to the court, for judgment and execution.

Where parties wish to ask the aid of the courts, for judgment upon an award, the submission to arbitrators must be in the manner required by law.

But if they do not design to seek the aid of the courts, to enforce the award, a submission, without complying with the regulations of the Code, may be made, by which the parties will be bound.

Where there is a submission to arbitrators by parol, or in a manner different from that required by the Code, the submission may be regarded as the means mutually adopted by the parties for an amicable settlement of their difficulties; and as such, should have the force and effect of a settlement made by the parties themselves.

If there is a failure to comply with the agreement to submit, or with the terms of the award when rendered, the remedy would be by action, either on the agreement or award; but such award could not, like one under the Code, be returned to court, for judgment and execution.

Such an award, may be set up as a defence to an action brought or prosecuted for the subject matter therein settled.

Where suit was brought before a justice of the peace, for the value of an ox, which the plaintiff alleged was killed by the defendant, and after the suit

was commenced, the parties, by agreement in writing, submitted the matters in controversy to the arbitrament of five persons named therein; and where on the trial before the justice, this agreement was set up as a defence, with the averment, that a majority of the said arbitrators had, by their written award, found the defendant not guilty, which defence was denied by plaintiff; and where on the trial of the cause in the District Court, on appeal, the defendant offered in evidence the agreement and award to sustain his defence, which was rejected by the court: *Held*, That the testimony offered was pertinent to the issue, and should have been admitted.

Appeal from the Wappello District Court.

THIS action was commenced before a justice of the peace. Defendant appealed to the District Court, where he made a motion to dismiss the cause; offered to introduce certain testimony; and asked instructions, which were rejected and refused by the court, and judgment being against him, he appeals to this court, where the following errors are assigned:

1. The court erred in overruling defendant's motion to dismiss the suit.

2. In refusing to allow defendant to introduce the testimony offered.

3. In refusing to give the instructions asked for by defendant.

The material facts of the case, will be found stated in the opinion of the court.

Charles Negus, for the appellant.

S. W. Summers, for the appellee.

WRIGHT, C. J.—The motion to dismiss the cause was correctly overruled. It was based upon the fact, that the parties had submitted the subject matter of the suit to arbitration, upon which there had been an award in favor of defendant, as shown by his answer, filed before the justice. This was denied, however, by plaintiff, as appears by the justice's transcript, and a written replication found in the record. And thus was raised an issue of fact, which could only be deter-

mined, like any other fact in the case, and could not be adjudicated on a motion to dismiss. There is nothing to show us, that the instructions asked and refused, had any application to the case. No part of the testimony is before us, and under such circumstances, we cannot say, that the court erred in refusing them. A court is not bound to give irrelevant instructions, and their relevancy must be shown affirmatively by the party complaining. The question as to the admission of the testimony, arises on the following state of facts: The plaintiff sues for the value of an ox, which he charges was killed by defendant. After the suit was commenced before the justice, as defendant claims, the parties by their agreement in writing, submitted the matters in controversy, to the arbitrament of five persons, named therein. On the trial before the justice, this agreement was set up, with the further averment, that a majority of said arbitrators had by their written award, found the defendant not guilty. These averments were put in issue by the plaintiff. In the District Court, defendant proposed to introduce this agreement and award, to sustain his defence, which being objected to, was rejected by the court. The grounds upon which the court acted in rejecting this testimony, is not shown, nor have counsel in their argument, pointed out the objections relied upon. It is probable, however, that the rejection was based upon the fact, that the submission was not made in the manner required by the Code; and thus the question arises, whether a submission and award will be good as between the parties, though they may not have pursued the course pointed out by the Code on that subject? And, briefly, we understand, that if parties wish to ask the aid of the court, for judgment upon an award, they must submit in the manner required by our law. But if they do not, a submission, without complying with the regulations of the Code, may be made, by which the parties will be bound. By the common law of the land, parties may by parol, submit any matters in controversy between them to arbitration; and this right has not been taken away by the provisions of the Code governing those awards, which are designed to be reported to

the court for judgment and execution. There is nothing in chapter 119, taking away this right, either in express words or by implication. This chapter is similar in its terms to that found in many of the states, and we understand it to have been frequently, if not uniformly held, under such statutes, that parties were not necessarily confined to such provisions, in submitting matters in controversy to arbitrators; but that they may adopt other methods, which will be equally obligatory upon them. When submitted by parol, or in a manner different from that required by the Code, it may be regarded as the means mutually adopted by the parties, for an amicable settlement of their difficulties, by the aid and assistance of their neighbors and friends; and as such should have the force and effect of a settlement made by the parties themselves. If there is a failure to comply with the agreement to submit, or with the terms of the award when rendered, the remedy would be by action, either on the agreement or award, and such award could not, of course, like one under the Code, be returned to court for judgment and execution. It may, however, be set up as a defence to an action brought or prosecuted for the subject matter therein settled. In *King* v. *Hampton*, December term, 1854, it appears that to an action to recover damages for the fraudulent sale of lands, defendant pleaded in bar, an arbitration and award. This was demurred to, for the reason that the arbitration was not conducted in strict conformity to the Code; that the award by the terms of the submission, was to be returned to a justice of the peace, instead of the District Court. The court, after disposing of other questions, add that they have no doubt but that the award was good, and could be enforced at common law, clearly indicating, from the whole opinion, that an award would be good as to the parties, though not rendered in the manner required by the Code. And to the same effect, see *Carpenter* v. *Edwards*, 10 Metcalf, 200; *Wells* v. *Dane*, 15 Wend. 99; *Ressequire* v. *Brownson*, 4 Barbour, 541; *McMuller* v. *Mays*, 8 S. & M. 298; *Norton* v. *Savage*, 1 Fairf. 457; *Keep* v. *Goodrich*, 12 Johns. 39. We conclude, therefore, that the testimony was improp-

erly rejected. The effect of it when introduced, is another question. There is nothing apparent on the face of the proceedings, that so far vitiates them, as to justify their exclusion. It may be that the award was made without notice to the plaintiff; or the agreement to submit may have been fraudulently obtained; and that in various methods plaintiff may avoid the effect of such proceeding. But *prima facie*, the testimony offered was pertinent to the issue, and should have been received.

Judgment reversed.

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CAMPBELL *v.* THE COUNTY OF POLK.

Where one of the errors assigned in a cause was as follows: "In overruling the motion of defendant, to quash the original notice," and where the bill of exceptions stated the reason for the motion to quash, as follows: "for the reason that the notice was not directed to the defendant. The notice reads as follows, to wit: (here insert;") and where the motion was not copied either into the bill of exceptions, or the transcript; *Held*, That this manner of referring to a paper in a cause was bad; and that the Supreme Court would not consider the error assigned thereon.

The case of *Brown* v. *The Board of Commissioners of Johnson County*, 1 G. Greene, 486, so far as it holds that a county warrant, drawn payable "out of any money in the treasury not otherwise appropriated," is not due until the fund is created, and judgment cannot be rendered upon such warrant, unless that fact is averred and established, overruled.

A warrant on a county treasurer, which provides that the sum therein named, is to be paid "out of any money not otherwise appropriated," is payable unconditionally; and if there is no money in the treasury, the county is liable.

The words "out of any money not otherwise appropriated," in a county warrant, mean that the warrant is not to be paid out of the school fund, road fund, or funds created for a special purpose.

The county judge is to be regarded as possessed of two distinct characters—the one, as the "general agent," of the county, and the other as judge.

The auditing a claim against the county, by the county judge, is a judicial act, in so far as an appeal will lie; but drawing a warrant upon the county treasurer, is a ministerial act.

Where in an action on three county warrants, the county pleaded that the warrants were issued without consideration, and set out facts showing that the warrants were issued through mistake, which plea was demurred to, on the

ground that nothing but fraud could be set up against the warrant; that defendant cannot go behind the warrants, and inquire into the consideration, and re-investigate the subject matter then acted upon and settled between the parties; and that when the county judge had once passed upon a matter within his jurisdiction, that action was final, unless appealed from, or impeached for fraud, which demurrer was sustained; *Held*, That the court erred in sustaining the demurrer.

Appeal from the Story District Court.

THIS is an action brought upon five county warrants, each of which is of the following tenor: "Office of County Judge, $300.

"POLK COUNTY, IOWA, June 14th, 1855.

"The treasurer of said county will pay to James Campbell, or bearer, the sum of three hundred dollars, out of any money not otherwise appropriated." They are signed by the county judge, and sealed with the seal of the county. On each is the following indorsement: "Presented, and refused to pay by the treasurer, June 15th, 1855," which is signed by the treasurer.

The defendant pleaded: 1st. That the warrants were obtained by fraud and misrepresentation; 2d. That they were issued without any consideration given. The answer states the facts to be (in substance), that the warrants were given as part of the price of a certain parcel of land, contiguous to the former town of Fort Des Moines, in Polk county, which had formerly been laid out into lots by the county commissioners, and made a part of the town; that, however, the said commissioners, in or about the year 1848, purchased the land of Campbell & McMullen, *and paid the consideration money;* but that for some reason no title was then made, but the vendors were, and remained liable to make the title, and that the county judge (who is the successor to the board of commissioners), seeking to perfect the title in the county, which had treated the land as its own and sold lots, and being ignorant of the fact that the purchase money had been paid, (the original consideration being three hundred dollars), is-

sued to the two vendors, warrants to the amount of fifteen hundred dollars each.

The plaintiff demurred to the second defence above-named, and the court sustained the demurrer. On the first defence —that of fraud—issue was joined, a trial had, and a verdict rendered for the plaintiff for the full amount.

The ground of demurrer to the defence of want of consideration, is that nothing but fraud can be set up against the warrants; that defendant cannot go behind the warrants, and inquire into the consideration, and investigate the subject matter then acted upon and settled between the parties; and that when the county judge has once passed upon a matter within his jurisdiction, that action is final, unless appealed from, or impeached for fraud. The court sustained the demurrer, and refused to permit the defendant to enter into the question of want of consideration. The defendant appeals, and the errors assigned are:

1. In overruling the motion of defendant to quash the original notice.

2. In sustaining the plaintiff's demurrer to the defendant's answer.

3. That plaintiff sets forth no cause of action in his petition, and that judgment was rendered for the plaintiff, when by law it should have been for the defendant.

B. Granger, *W. W. Williamson*, and *J. Parish*, for the appellant.

Curtis Bates, for the appellee.

WOODWARD, J.—The first error is upon overruling the motion to quash the original notice. A bill of exceptions is taken to this matter, which says the motion was "for the reason, that the notice was not directed to defendant. The notice reads as follows, to wit: (Here insert)," but there is no such motion among the papers; and if there was, such a mode of referring to it, is bad. We shall therefore pass this assignment, and we do it the more readily, because it appears that the defendant was represented by counsel.

The second and third assignments must be considered together. The plaintiff's demurrer to the defendant's answer, opens to the question of the sufficiency of the plaintiff's petition and ground of action, and the defendant makes the question.

First, he says, that neither the commissioners nor the county judge, had authority to buy land, to expend the county funds in such a manner. Sufficient does not appear on the papers, under the demurrer, to raise this question properly, for it is stated only, that the land was purchased, and possession taken; and that it was laid out into town lots, and a part of them were sold. Now, it does not appear that it was not purchased to provide for a court-house, a jail, or other proper public buildings, or for some other legitimate purpose; nor that it may not, in fact, have been taken in payment of a debt due from the vendors. And the court will not *presume* it to have been obtained for an unlawful purpose, nor in an unlawful manner. We do not intend to intimate an opinion as to the authority, under any other supposed circumstances, but to say only that the point cannot be well made at present.

The second point here made by the defendant is, that the action does not lie, without an averment that there are funds in the county treasury not otherwise appropriated. That an action may be maintained against a county, on its orders, drafts, or warrants, drawn on the treasurer, without going back to the original consideration, is settled by the cases of *Brown* v. *Board of Commissioners of Johnson County*, 1 G. Greene, 486, and *Steel* v. *Davis County*, 2 Ib. 369. In this part of those decisions we concur, for the practice is convenient, and whatever technical objections to it might exist, on account of the precise nature of the instrument, they are obviated by our statutes relating to instruments and actions. But the objection is based upon the case of *Brown* v. *Commissioners of Johnson County*, in which a warrant, drawn payable "out of any money in the county treasury, not otherwise appropriated," is assumed to be drawn upon an uncertain fund, which must be alleged and proven to exist. We

are disposed to differ from the opinion of the majority of the court in the above case. Upon this question, that opinion is exceedingly brief. There is no argument, no reasoning. The point is simply assumed. GREEN, J., dissents, and in his opinion expresses the truer reasoning.

We are perfectly sensible of the importance of the idea of overruling former decisions, but in the present instance, this responsibility is alleviated by the fact of a dissenting opinion in the foregoing cause, and the brevity, and want of reasoning and authority, in the opinion of the majority, and by the consideration that no settled interests or titles will be disturbed by the change.

In a warrant payable like these, from any money not otherwise appropriated, what do the words, "not otherwise appriated," mean? There is reason to doubt whether they mean anything. There is no mode in which the county judge appropriates the money of the county, other than by drawing warrants on the treasurer. The statute, (Code, § 454,) allows a tax for schools and for roads within certain amounts, and sometimes for special purposes. These funds may, in some sense, be said to be appropriated. But there may be, and there is, levied a tax for "ordinary county revenue." This, as the terms imply, is to meet the ordinary and miscellaneous demands upon the county. The most that the above language in the warrants can mean, is that they are not to be paid from those, or similar *special* funds. It might be said, truly enough, that when payable from the general resources of the county, the warrant may be drawn without such words or qualification. This is true enough; and yet what effect has the addition of those words, but to *express* the idea that they are *not* to be paid from those special funds?

Then the only question is, whether the creditor of the county should be held to aver and show that there is money in the treasury; and it is as clear to us as any proposition can be, that he should not be held to this. He is obliged to have his claim settled by the county judge; the judge cannot pay the money, but is obliged to draw a war-

rant on the treasurer for it. Now is there any reason or justice in saying, that the creditor must allege and prove funds to be in the treasury, because he took a warrant, or because he took *such* an one? Upon a refusal to pay, he might return the warrant and sue on the original consideration, and then he would be relieved from that responsibility. In the opinion of this court, these warrants were payable unconditionally, and if there was no money in the treasury, the county is answerable. All considerations of justice and of good law, require this decision.

The next question is, whether the District Court was correct in sustaining the demurrer to that part of the answer—or to that defence—which alleges a want of consideration, and in refusing to permit the defendant to show this? The ground taken in the demurrer is, that the action of the county judge is an *adjudication;* that it is final, unless an appeal is taken; and that it cannot be reached in this manner. The argument is, that it is the *settling of a demand*, and that it is a *judicial* act, and is to be treated as such. This, also, is the view—and the only one—in which it is discussed in the arguments on both sides. Therefore, we shall consider it under the same point of view, assuming that this was the ground upon which the court decided the demurrer.

We are constrained to differ from the opinion of the District Court. It seems impossible to avoid viewing the county judge as possessed of two distinct characters—the one, as the "general agent" of the county, and the other, as a *judge*. It may be difficult to define the limits of the two, and cases may arise in which it will be difficult to discriminate, but this affords no argument against the distinction in cases which are clear. The statute seems to give countenance, on its face, to the thought that the judge acts in these two capacities, by the division of chapter 15 of the Code, when at section 125, it professes to treat of him "as a county court." But the main argument lies in the nature of the case. It is true that the character and the duties may often intermingle; and it is true that the county *court* is to be considered in law as always open. But there are cases in which we cannot con-

sider him as acting in a judicial capacity, but must view him as an *agent*—as one appointed to attend to the interests of the county, and to do its business—cases in which he is merely a business man. Such will arise under section 105 of the Code, by which he is empowered to "take the management of all county business, and the care and custody of all the county property;" is required to keep certain books; is authorized to institute and prosecute actions for the benefit of the county, and to superintend its fiscal concerns, and secure their management in the best manner; to keep and publish an account of the receipts and expenditures; and to provide rooms, books, stationery, and furniture, for the county offices, &c. Some of these acts are purely ministerial, whilst others are at least, *not judicial.*

The auditing a claim is judicial, in so far as an appeal lies, but drawing a warrant, is ministerial. And neither the buying a piece of land, nor the agreeing upon the price, is a judicial act. In such a transaction, the parties must stand as equals. If the act is judicial as against one side, it must be against the other also. The judge's refusal to purchase, becomes judicial decision, and as it affects private interests, the proposed vendor may appeal; and carrying out the logic, if the judge offers to give a less sum than is asked, it is a judicial decision, and the vendor is bound to comply, unless he appeal. This seems strange, but is it not the natural consequence of regarding *all* acts of the county judge as judicial? If he is *judge always*, there can be no such thing as negotiation.

In truth, it is necessary to regard him sometimes as an agent only, or as we would any other man transacting business. If a county judge causes a fence to be built about its court-house grounds, and trees to be set out, it is not done judicially, nor is agreeing upon the price. But the same matter may assume a judicial character partly. Thus, if the judge refuses to pay the price agreed, or to allow a reasonable compensation, when none was agreed upon, the demand may be presented in such form and manner as to allow an appeal. Contracting for the building of a court-house, or

jail, is not a judicial act; and if warrants are drawn in advance of the work contracted for, and then it is not done, would it be contended that payment of the warrants may not be refused; and if a succeeding judge, through ignorance of the facts, or mistake, issues new warrants for the same work, may it not be shown that the work had already been paid for, and that the second warrants are without consideration? It seems manifestly necessary to discriminate between the acts of this officer; otherwise many who suppose they are negotiating a business transaction with him, may find themselves bound up by a judicial decision. It will not be practicable to regard the same transaction at one moment, or on one side, as a business one; and in the next moment, or on the other side, as a judicial proceeding.

It is not made to appear in what *manner* this matter was presented to, or came before the county judge, and no question is made upon this, in the case. It is the opinion of the court that the defence should have been admitted to proof, and that the court erred in sustaining the demurrer.

The judgment is reversed, and the cause remanded for further proceedings.

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TAYLOR, SHIPTON & CO. *v.* RUNYAN & BROWN.

Where in an action on a transcript of a judgment rendered in the state of Pennsylvania, it appeared from the transcript, that a summons was issued June 21, 1838, and returned as follows: "Summoned by copy of original, left at the residence of defendants, May 13, 1838." *Held*, That the evidence of personal service on the defendants, was sufficient in the courts of this state.

And where in such a case, it appeared from the precipe, statement, summons, and return copied into the transcript, that on the 21st of May, 1838, the plaintiffs filed the precipe and statement, claiming of defendants the sum of $15.396, in an action of debt, on a sealed note; that on the 21st of June, 1838, summons issued, returnable "on the first Monday of June next," which was returned with the following indorsement: "Summoned by copy of the original, left at the residence of defendants, May 13, 1838. M. Allen, Sheriff;" and where the docket entry was as follows:

"Howell,		Statement.	Summons.—Debt.
Hennikers,			Issued May 21st. Summoned
Attys for tax,	50	TAYLOR, SHIPTON & Co.	by copy of original, left at the
Pro. Sloan,	$2.41		residence of defendants, May
Atty St.	3.50	*vs.*	23d, 1838.—$2.53.
Shiff. A.	2.53		June 14th, 1838. Judgment
		RUNYAN & BROWN.	*sec. reg.* for want of plea.
	$8.44		January 9th, 1839, sum as-
			certained at $155.07. Inter-
			est from June 14, 1838.—

"*Fi. fa.* for debt, interest and costs, to March term, 1839;" *Held*, That the transcript, on its face, did not show a judgment rendered in the courts of Pennsylvania.

Appeal from the Jefferson District Court.

PLAINTIFFS declare upon a judgment rendered in the Court of Common Pleas of Fayette county, Pennsylvania. To the declaration is attached what purports to be a transcript of the judgment, the material facts of which are as follows: On the 21st of May, 1838, plaintiffs filed their precipe and statement, claiming of defendants the sum of $153.96, in an action of debt on a sealed note. On the 21st of June, 1838, summons issued, returnable "on the first Monday of June next," which was returned with the following indorsement, "Summoned by copy of the original, left at the residence of defendants, May 13th, 1838. M. Allen, Sheriff." These dates appear from the precipe, statement, summons, and return, copied into the transcript. And then follows a "Copy of the Docket Entry," as follows:

"Howell,		Statement.	Summons.—Debt.
Hennikers,			Issued May 21st. Summoned
Attys for tax,	0.50	TAYLOR, SHIPTON & Co.	by copy of original, left at the
Pro. Sloan,	$2.41		residence of the defendants,
Atty. St.	3.50	*vs.*	May 23d, 1838.—$2.53.
Shiff. A.	2.53	RUNYAN & BROWN.	June 14, 1838. Judgment
			sec. reg. for want of plea.
	$8.44		January 9th, 1839, sum as-
			certained at $155.07. Inter-
			est from June 14, 1838.

"*Fi. fa.*, for debt, interest and costs, to March term, 1839." A *fi. fa.* was issued accordingly, and returned *nulla bona.*

And afterwards an alias *fi. fa.* was issued to the sheriff of Alleghany county, which was returned: "Stayed by order of plaintiff." The *fi. fa's.*, and the returns thereon, are set out in full in the transcript, and the proper certificates are attached, to the effect that the said transcript contains a full and perfect copy of the record, and of all the papers, and docket entries, in any way relating to said cause. To the declaration, Brown demurs, for the following reasons: *First.* That there was no service of process on defendants, as shown by said transcript, nor appearance by them; and *Second.* Because said transcript does not show that any *judgment* was ever rendered by any court. This demurrer was sustained, and from this ruling plaintiffs appeal.

C. C. Nourse, for the appellants.

The demurrer of defendant, which was sustained by the court below, assigns four causes of insufficiency in the petition, all of which relate to the transcript of the judgment.

1st. That the papers do not show that any judgment was rendered by the court.

The transcript recites, that "among the pleas and records enrolled in the Court of Common Pleas, at Uniontown, in and for the county of Fayette, in the Commonwealth of Pennsylvania, before the Hon. SAMUEL A. GILMORE, Esq., President, and his associates, judges of the same court, at the term of June, A.D. 1838, No. 155, it is contained," &c., &c. This discloses the fact that these are the proceedings of a court of general common law jurisdiction, and of original jurisdiction, having complete jurisdiction of the *subject matter in controversy.* On page 4, we have the docket entry, containing the full adjudication and finding of the court. 1st. The names of the parties. 2d. The names of the attorneys, both for plaintiffs and defendants. The court find: Summons issued, May 21. Service, by copy of original, left at the residence of defendant, May 23d, 1838; June 14th, 1838. Judgment "*sec. reg.*," for want of plea; January 9th, 1839, sum ascertained at $155.07; Interest from June 14th, 1835.

The words *sec. reg.* which seemed to be a stumbling block

in the court below, and which counsel for defendants insisted referred to another record, not copied in the transcript, simply means "*secundum regulum*," Latin words, importing *secundum*, according to, *regulum*, regulation or rule. The rule not only of that, but of all courts: "That when the defendant has appeared and fails to plead to the declaration of plaintiff, the plaintiff may have judgment." The idea that there is a further portion of this record, is contradicted by the certificate of the clerk. This disposes of the first and second objection contained in the demurrer.

The third cause of demurrer is, that the transcript shows no service, and no appearance. Neither is sustained by the record. An appearance for Runyan & Brown, by Mr. Henniker, is sufficiently stated, not only in the margin, but by the fact that the judgment is not by default for want of appearance, but is *sec. reg.*, for want of a plea, which imports absolutely an appearance by the defendants; and this appearance cures all defects in the service and all irregularities in the process. *Voorhees* v. *The Bank of United States*, 10 Peters, 469; *Hart* v. *Cummings*, 1 Iowa, 564; *Latterett* v. *Cook*, 1 Ib. 1.

The defects in the matter of the dates of service are clearly clerical errors, as they show service before issue, &c. The filing of the precipe and the time of service stated in the judgment of the court, are consistent. Any clerical errors or defects in the *manner or time of service*, or *defect in the return*, can only be cured by writ of error, or on appeal. They cannot affect the conclusiveness of the finding of the court or of the judgment, in a collateral proceeding, or in a suit of this nature. *Thompson* v. *Tolmie*, 2 Peters, 162; 2 Howard, 319; 6 Ib. 31. The fact is, there *was a service;* the record shows it. As to the *time* and discrepancies in the *time*, or contradiction in the dates, they were matters of adjudication in the court of common pleas in Fayette county. If the court erred, the remedy was by appeal.

Charles Negus, for the appellees.

The defendants claim the following as grounds of defence:

1. That the defendants had no legal notice of the pending of the suit, and that they made no appearance in court, and consequently the judgment, if any there is, is void and of no force. See 2 U. S. Digest, 224. A judgment against defendant, who has had no notice of the suit, either actual or constructive, is a nullity. *Anderson* v. *Miller*, 4 Blackford, 417; *Smith* v. *Ross*, 1 Mis. 463; *Woods, ex parte*, 3 Pike, 532; 2 U. S. Digest, 244.

2. Everything in the transcript which shows that there ever was a judgment, is the following words: "June 14th, 1838. Judgment *sec. reg.* for want of a plea." And defendants claim that this does not amount to a judgment, and that there is nothing in the transcript which will authorize the rendering of a judgment in favor of plaintiff. 2 U. S. Digest, 223. The rendering of a judgment is a judicial act to be done by the court only. *Matthews* v. *Moore*, 2 Murph. 181. An entry by a justice of the peace in the record, that the plaintiff filed his demand for thirty dollars; the defendant not appearing, the plaintiff proved his demand, and I gave judgment for the same, is not a judgment. *Polhemus* v. *Perkins*, 3 Green, 435. There is nothing in the transcript which shows that the proceedings were had by any competent court, to adjudicate the matter. And the record is not signed by any person purporting to be judge.

WRIGHT, C. J.—We think the first point in the demurrer, is not well taken. A very similar question was before this court, in the cases of *Latterett* v. *Cook*, 1 Iowa, 1, and of *Hart* v. *Cummins*, 1 Ib. 564. The evidence of personal service in this case, is more full than in either of those, and while there are some discrepancies in dates, they are at most but irregularities, into which an appellate court in Pennsylvania might inquire, but for which this court would not hold the judgment, if one has been rendered, invalid.

The second question has not been before this court, and is of more difficulty. Our law requires that where a pleading is founded on a written instrument, a copy of it shall be annexed to the pleading. When so annexed, it becomes a part

of the pleading, and it is all to be connected together. When thus construed, if there is not shown a substantial cause of action, it is a good ground of demurrer. In this case, plaintiffs seek to recover the amount of a judgment, which they claim to have been rendered in the county of Fayette, state of Pennsylvania. The petition is in the usual form, averring that at such a time the plaintiffs by the consideration of the court, &c., recovered a judgment for an amount, which they proceed to set forth. To this petition, they annex what is termed a transcript of the judgment and proceedings, so rendered and had in the Pennsylvania court. The question now is, whether the transcript so annexed, taken in connection with the petition, shows that plaintiff has a substantial cause of action? or whether there is sufficient to satisfy us, that the judgment was rendered as claimed?

The constitution of the United States provides, that full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state; and that the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Congress did accordingly, by the act of 26th of May, 1790, chapter 11, provide for a mode of authenticating such records and judicial proceedings of the state courts, and then declared that the "records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are, or shall be taken. By this act, it is now well settled, that Congress not only provided a means for the admission of such records as evidence, but also declared the *effect* of such evidence, when so admitted. This was done by declaring what faith and credit should be given to such records, and that is such as it may have by law or usage, in the courts of the state from whence it may be taken. The material inquiry in most cases, where the jurisdiction is not denied, therefore is, what is the effect of such judgment or record in the state where rendered? In this case, however, the material question is, whether a

judgment has been rendered? For if there is not sufficient in this record to show the rendition of a judgment, all further inquiry ceases. When we speak of a judgment under our law, in its broadest sense, we mean all final adjudications of civil actions. Code, § 1814. At common law, this judgment is the sentence of the law, pronounced by the court, upon the matters contained in the record of an action before it. When we speak of a final judgment, therefore, we understand it to be, the application of the law by the court, to the particular case before it, and specifically granting or denying the remedy sought by the action. 3 Black. Com. 395. And the same author speaks of the judgment as "the remedy prescribed by the law for the redress of injuries, and the suit or action as the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study, to point out, and therefore, the style of the judgment is not, that it is decreed, or resolved by the court, for then the judgment might appear to be their own; but, "it is considered,"—*consideratum est per curiam*,—that the plaintiff do recover his damages, his debts, his possession, or the like, which implies that this judgment is none of their own; but the act of the law pronounced and delivered by the court, after due deliberation and inquiry. In general, the nature of the judgment is intimated or stated by the court, and the clerk enters it on the minutes in due form.

This court has before held, with reference to judgments rendered in this state, that no particular form of words is necessary, and we are not inclined to apply a more stringent rule, to the judgments of other states, when prosecuted in our courts. We should, therefore, not hesitate to enforce a judgment, because the word *decreed* or *resolved*, should be used instead of *considered*. But we cannot but think, that there should be something more than appears in this case, to show that a court has acted, in applying the law to a cause or action before it; something to show more clearly, that there has been a judicial determination, decision or adjudication. While there is no *particular* form necessary, yet there must be *some* form, something to show that the judg-

ment stated or indicated by the court, has been entered by the clerk. We feel satisfied that, independent of some particular statute, rule, or usage in the state, from whence this supposed judgment was taken, there is not sufficient to give it the force and effect of a judicial determination in this state. Except the language used may be aided by such statute, rule, or usage, it is extremely indefinite. On its face, there is nothing to show by whom the judgment was rendered, or against whom, nor for what amount, if in fact there is a judgment by any court, or against any person. "Judgment *sec. reg.* for want of plea," appears to be entered, June 14th, 1838, and then January, 9th, 1839, "Sum ascertained at $155.07;" and this is the substance of all we have to show a judgment. This appears to us to be too barren of every essential requisite of a judgment entry, to authorize us to dignify it with that name, unless it has the faith and credit due to a record or judicial proceeding, by virtue of some local law, rule, or usage, in the state where it purports to be rendered. It is said by appellants, however, that this is the usual form of a judgment in Pennsylvania, and that nothing more is required by the *laws* of that state. No statute has been brought to our attention, however, to warrant this position. In our investigation, we have found that the statutes of that state, speak generally of the rendition of judgment—of the duty of prothonotaries to make, prepare, and keep a judgment docket, into which they are required to copy the entry of every judgment, after the same shall have *been entered*—of the duty of the judges of these courts of record, to sign judgments when rendered, and the date of such signing, "upon the margin of the record where the said judgment shall be entered," and other provisions that certainly do not indicate that judgments in that state when entered, are any different in form from those found in our own or other states. See 6th edition Parden's Digest Laws of Pennsylvania, 604, 605, 907.

But it is further claimed, that this form is sufficient, and shown to be so, under the *rules* established by those courts. No such rules are before us, in any way that we could pos-

sibly notice them. The transcript, as already shown, uses the words judgment *sec. reg.* The writing is not entirely legible, and the appellees claim, that these abbreviations are see. reg., and mean, see register; thereby referring to some other book for the judgment. The appellants, on the other hand, claim that the true reading is *sec. reg.* meaning *secundum regulam*, or according to rule or regulation. And the latter, we are satisfied, is the true meaning of the record. But when thus understood, we construe it to mean nothing more than a note or memorandum, showing that judgment was to be entered according to rule; and not that it was according to rule to enter a judgment in that way. See Dig. Penn. cited above, 47, 240. The defendant, it is said, failed to plead, and plaintiff was entitled to judgment for default of appearance, "according to rule established by the court, to regulate the practice in this respect." This may be true, but the evidence that a judgment was accordingly entered—that there was judicial action—that the law was applied to the case before the court, "according to rule," or otherwise, is what is wanting. To be *entitled* to judgment, "according to rule," and to have it *entered* according to law or rule, are quite different things.

We find one case, in many respects similar to this, adjudicated in the Supreme Court of the United States. It appears that the United States sued one Reeside, in the Circuit Court of the United States, for the Eastern District of Pennsylvania, on certain post-office contracts, to which he pleaded a set-off. The jury returned a verdict for defendant, on the several issues joined, for $188,496.06. The secretary of the treasury of the United States, refused to allow this sum, or to recognize it as due the defendant. Application was made by his executrix to the Circuit Court for the District of Columbia, for a *mandamus* against that officer, directing him to pay the sum so found by the jury to her. The application set forth all the proceedings, and averred that final judgment had been entered on the said verdict. The petition for the writ having been dismissed by the Circuit Court, the executrix appealed to the Supreme Court, and WOODBURY, J., in de-

livering the opinion of the court, says: "On an examination of the record, the first objection to the issue of a mandamus seems to be, that no *judgment* appears to have been given, such as is set out in the petition, in favor of Reeside, for the amount of the verdict. Certain minutes were put in of the proceedings in that suit, beginning with the writ in 1837, including the verdict, and coming down to May 12th, 1842, when it is said, "new trial refused, and judgment on the verdict." But these seem to be the mere waste docket minutes, from which a judgment or a record of the whole case, could afterwards be drawn up. They do not contain a judgment *in extenso*, nor are they a copy of any such judgment. *Reeside* v. *Walker*, 11 How. 272. And so it appears to us in this case, that we have before us but minutes, docket entries from which a judgment could or might be afterwards entered up. Or if not this, it is no more than the brief entries frequently found in what, in this state, we style the "judgment docket," and not the judgment entered in what we term the "record book," or book in which the proceedings of the court are found.

Our attention has been called to the case of *Slicer* v. *The Bank of Pittsburgh*, 16 How. 571. That case is, however, very different from this, in all of its facts and circumstances, and we find nothing in it indicating a different view from that above taken. But it is said, suppose it to be true, that this is the only form used in Pennsylvania, and all the evidence to be had of the entry or rendition of judgments by their practice, is there no way to enforce their collection in this or other states? We answer, that if it be true that by law, or usage in that state, judgments are thus entered, and have within that jurisdiction full force and credit, then a like force and credit will be given to them here. In the petition before us, however, there is no averment showing that such is the case. It is simply averred, that the plaintiffs obtained judgment against defendants, in a certain court which is named, and the transcript set out in the statement of the case, is annexed as evidence of the judgment on which they declare. We simply determine, that taking it all to be true,

upon general principles, without reference to any local or state law or usage, the plaintiff could not recover. Did the petition aver, and the proof on the trial show, that by the laws, practice, and usage of the state whence this transcript was taken, it was entitled to the faith and credit of a judgment, we should feel bound to give it the same force and effect. As the case is now presented, however, we think the demurrer was properly sustained.

Judgment affirmed.

COOK, SARGENT & COOK *v.* SYPHER.

The decision of the District Court, granting or refusing a new trial, may be reviewed in the appellate court.

Section 1810 of the Code, which provides that on applications for new trials, the affidavits of jurors may be taken, and used in relation thereto, was only designed to declare the law as more recently settled by the adjudications of the English and American courts, and not to introduce the dangerous practice of allowing jurors to impeach their own verdicts to any extent.

Where on the same day after trial and verdict for the defendant, the plaintiff filed a motion to set aside the verdict, and for a new trial, which was overruled, and judgment rendered on the verdict; and where on the next day, the motion was renewed, the plaintiff filing in support thereof, the affidavit of one of the jurors, stating that the verdict was not voluntary on his part—that it was made without his consent—and that it was never his verdict, which motion was then sustained, the verdict and judgment set aside, and a new trial ordered; *Held*, That the affidavit of the juror was improperly received.

Appeal from the Polk District Court.

TRIAL and verdict for defendant. On the same day, plaintiffs filed their motion to set aside the verdict, and for a new trial, which was overruled, and judgment on the verdict. On the next day, this motion was renewed, the plaintiffs filing in support thereof, the affidavit of one of the jurors who tried the case, to the effect that the verdict was not voluntary on his part; that it was made without his consent; and

that it was never his verdict. The motion was then sustained, verdict and judgment set aside, new trial ordered, and cause continued. From this order, defendant appeals.

Samuel A. Rice, and *J. E. Jewett*, for the appellant, made the following points:

1. The granting a new trial, is not a mere arbitrary right in the court granting the same, but a legal discretion is to be exercised, which is open to review. 2 Graham & W. on New Trials, 46; *Prest, &c., Brooklyn*, v. *Patchen*, 8 Wend. 47; *Hudson et al.* v. *Williamson*, 1 South Car. Const. 360; *Jourdan* v. *Reed*, 1 Iowa, 135.

2. The affidavits of jurors to impeach their verdict, are not allowed. *Burns* v. *Paine*, 8 Texas, 159; *Bishop* v. *State*, 9 Georgia, 121; *Norris* v. *State*, 3 Humph. 333; *State* v. *Freeman*, 5 Conn. 348; *Dana* v. *Tucker*, 4 Johns. 487; *Cluggage* v. *Swan*, 4 Binney, 150; *Cochran* v. *Street*, 1 Wash. 78; 3 Graham & W. on New Trials, 1428.

3. A new trial will not be granted upon the affidavit of a juror, that he did not assent to the verdict. *Luttrell* v. *Day*, 1 Murphy, 94; *State* v. *Doan*, R. M. Charlt. 1; *Johnson* v. *Davenport*, 3 J. J. Marsh. 390; 3 Graham & W. on New Trials, 1441.

Curtis Bates, for the appellee.

WRIGHT, C. J.—It was held, in the case of *Stewart* v. *Ewbank*, *Ante*, 191, that the decision of the District Court in granting or refusing a new trial, might be reviewed in this court. In that case, the order granting a new trial by the court below, was reversed, and the cause remanded, with directions to the court below, to enter judgment on the verdict. Such orders, depending as they do, in many instances, upon the discretion of the court trying the cause, should be reviewed with great caution, but the power to review is fully recognized by the foregoing case, as well as many others therein cited. The question in this case, then is, whether this discretion was properly exercised? And this depends

upon the further question, whether the affidavit of the juror could be received *to impeach* the verdict? The Code provides, that in applications for new trials, the affidavits of jurors may be taken, and used in relation thereto. Section 1810. Under this section, can a party be allowed to use such affidavits to *impeach* the verdict, for the causes in this affidavit stated? We think, this provision was only designed to declare the law as more recently settled by the adjudications of the English, and many, and we may say most, of the courts in this country; but was not designed to introduce the dangerous practice of allowing jurors to impeach their own verdicts, to the extent here attempted. The settled rule, independent of the Code, we understand to be, that such affidavits may be received in *support* of the verdict, or for the purpose of enforcing it, but not to *impeach* it. The objections to the use of such affidavits to impeach, are forcibly stated in the case of *Willing* v. *Swasey*, 1 Brown, 123; and we need do no more than make the following extract therefrom: "It (such an affidavit to impeach) ought to be rejected, because it tends to defeat the juror's own solemn act under oath, where third persons are interested. It ought to be rejected, because its admission would open a door to tamper with jurymen, after they had given their verdict; it ought to be rejected, because it might be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time, after he had assented to it; in fine, it ought to be rejected, because it would unsettle all the verdicts in the country." And this same view is sustained by the following cases, as well as by numerous others. *Vaire* v. *Delaval*, 1 Term Rep. 11; *Owen* v. *Warburton*, 1 New Rep. 326; *Dana* v. *Tucker*, 4 Johns. 487; *The People* v. *Columbia Common Pleas*, 1 Wend. 297; *Basley* v. *Chesapeake Ins. Co.*, 3 Gill & Johns. 473; *Blader* v. *Cockey*, 1 Har. & McHen. 230; 1 Graham & Wat. on New Trials, 111 to 116; *Lloyd* v. *McClure*, 2 G. Greene, 139.

The Code recognizes the right of a party to have the jury polled, at the time the verdict is rendered. And so any juror might then state, without inquiry, that he did not consent to such verdict. But when he leaves the box, he should no

longer be allowed to aver that the verdict was not voluntarily rendered. And the circumstances of this case, tend strongly to show the impolicy of allowing such affidavits. An application for a new trial was made and overruled, on the day of the rendition of the verdict. On the next day, this affidavit is produced, and the motion again urged. In the meantime, the jury has separated; ample opportunity has been afforded to appeal to the juror's feelings and prejudices; to work upon his natural commiseration for the losing party; to appeal to his desire in some way to apologize for the performance of his unwelcome duty; and, indeed, in various methods, to induce him to unsettle the litigation, which was in effect terminated by the verdict. If this could be allowed one hour or one day after he had left the box, why not within a week or month, if the term shall last so long. It appears to us, there would be no end to the evil and dangerous consequenees resulting from the rule adopted by the court below. The affidavit was improperly received, and the cause will be reversed, with instructions that the judgment on the verdict remain undisturbed.

TIFIELD *v.* ADAMS.

Where, in an action for services rendered under an agreement in writing, dated February 23, 1854, to take effect on the 21st of March ensuing, and to continue for one year, in which the plaintiff undertook to perform the duties of editor of a weekly newspaper, and those of proof reader, and for which the defendant was to pay ten dollars per week for the editorial duties, and an additional compensation for the other services, it appeared that, shortly after making the contract, the defendant commenced the publication of a daily and tri-weekly, in addition to the weekly paper, and subsequently took in a partner, who became part owner of the concern; and where the defendant answered, admitting the execution of the contract, but averred that it was abandoned at the time of commencing the publication of the daily paper, and that a verbal one was substituted, by which the defendant was to pay the plaintiff twelve dollars per week; and that afterwards the plaintiff claimed fifteen dollars per week, and as they could not agree, this verbal contract also was rescinded; which answer also

denied any indebtedness on the part of the defendant, and to which there was a replication in denial of the new matter; and where the following facts appeared in evidence: That the matter of the weekly paper was made up principally from the matter of the daily; that such was the usual mode in offices publishing both a daily and weekly; that in consequence of this custom, an editor was not required especially for the weekly, but yet that the weekly would require some editorial care; that the plaintiff acted as editor of the daily, and for some weeks received twelve dollars per week; that defendant was kept from the office sometimes by illness; that H., the partner subsequently taken in, in paying the plaintiff twelve dollars for a week's service, did so under the impression that that was the sum the plaintiff was to have by the contract; that plaintiff did not so understand the contract; that on the last occasion when H. paid plaintiff, he was about to pay him twelve dollars, when plaintiff said he was to have fifteen dollars—that such was the agreement, and his services were worth that sum; that he and H. differed about it, and the latter told him that he might leave, as his services were not wanted at that price; that the plaintiff left; that in about two days afterwards, plaintiff met the defendant and H. at the house of defendant, and they tried to come to some understanding, but they could not agree, and separated without effecting anything; that in that conversation the contract between plaintiff and defendant was mentioned as subsisting; that three or four days afterwards the plaintiff left "copy" with the "hands" of the office; that H. was absent at the time, and when the "hands" asked him what was to be done with the copy, he told them not to set it up; that other tenders of service were made after that time, which were refused; that the defendant admitted that there had been an agreement, subsequent to the first one, that five dollars per week additional should be paid for the extra trouble in editing the daily, and that the increased labor in editing the daily was worth that sum; and where it was admitted that the plaintiff, since June 27, 1854, had held himself in constant readiness to fulfill his part of the contract; and where the defendant asked the court to instruct the jury as follows: "That if the plaintiff quit the office, either because he was not wanted or because his wages were not high enough, such quitting may be regarded as an abandonment of the old contract;" "2. That the fact that plaintiff quit the office, and did not edit the weekly or daily for several days, and that the parties tried to make a new contract which would have superseded the old one, may be construed to be an abandonment of the old contract by both of the parties," which instructions were given by the court, with the qualification, that if the plaintiff "*voluntarily quit*," &c., to which qualification the defendant excepted: *Held*, That the court properly qualified the instructions.

And where, in such a case, the defendant asked the following instruction: "That if plaintiff did not wish to abandon the first contract, he should have refused to quit; but if the jury believe he did quit, and that he was absent from the office several days, the defendant had a right to refuse to receive his copy," which instruction the court refused to give: *Held*, That the instruction was properly refused.

And where, in such a case, the defendant asked the court to instruct the jury as follows: "That if, after the defendant took H. into partnership, the plaintiff performed work as editor for defendant and H. and received pay from them, this, by operation of law, amounts to an extinguishment of the original contract, and the making of a new one between plaintiff and the partnership," which instruction the court refused to give: *Held*, That the court did not err in refusing to give the instruction.

Although the court may, in its discretion, give instructions, with qualifying terms, yet it is not the *duty* of the court so to correct or limit them. It may refuse the instructions totally, and leave the party proposing them to assume the hazard of their entire correctness.

Where, by the consent of the parties, the court authorized the jury to seal up their verdict, and hand the same to the court, by their foreman, and disperse, which they did; and where the verdict was opened by the clerk and read as follows: "We, the jury, find for the plaintiff, according to contract;" and where the verdict, on the motion of the plaintiff, was recommitted to the jury to be amended, to which the defendant objected, and the court instructed them, that they must "assess the amount of the plaintiff's damages, allowing the defendant all credits to which he is entitled;" and where the jury returned the verdict in the same terms, with the addition of the amount of damages found; *Held*, That as it did not appear that the jury were *not* reassembled before the verdict was opened, error was not apparent in the proceeding.

Appeal from the Dubuque District Court.

THIS is an action brought to recover for services rendered on a written contract, dated 23d February, 1854, to take effect on the 21st March, and to continue for one year, by which the plaintiff undertook to perform the duties of editor of the Dubuque Weekly Tribune, and those of proof reader, and the defendant was to pay ten dollars per week for the editorial duties, and an additional compensation for the other services. Soon after the making of this contract, Adams commenced the issuance of a daily and tri-weekly, in addition to the weekly paper. After a little further time, probably in May, Hackley became a partner and part owner in the paper, with Adams. The defendant's answer denies all indebtedness to the plaintiff. He admits making the original contract set up by the plaintiff, but avers that this was abandoned at the time of commencing the daily paper, and that a new verbal one was substituted, by which he was to pay plaintiff twelve dollars per week; that after-

wards plaintiff claimed fifteen dollars, and, as they could not agree, this contract also was rescinded. An imperfect summary of the evidence is given, but sufficient probably is embraced to show the pertinency of certain instructions, which is its principal object. This summary states that there was evidence, showing that the matter of the weekly paper was made up principally of the matter of the daily; that such was the usual mode in offices publishing both a daily and a weekly, and that in consequence of this, an editor was not required especially for the weekly, but yet that the weekly would require some editorial care; that Tifield acted as editor of the daily, and for some weeks received twelve dollars a week; that Adams was kept from the office sometimes by illness; that Hackley testified that, in paying plaintiff twelve dollars for a week's service, he did it under the impression that that was the sum which he was to have, (that is, by the contract,) but it did not appear that Tifield so understood it; that on the last occasion when Hackley paid him, he was about to pay him twelve dollars, when Tifield said he was to have fifteen dollars; that such was the agreement, and that his services were worth that; that he and Hackley differed about it, and the latter told him he might leave, as his services were not wanted at that price, and that Tifield left; that in about two days afterwards, plaintiff met the defendant and Hackley at Adams' dwelling-house, and they tried to come to some arrangement or understanding, but they could not agree and separated without affecting anything; that the contract between Tifield and Adams was mentioned as subsisting; that three or four days afterwards, Tifield left "copy" with the "hands" of the office; that Hackley was absent at that time, and when the "hands" asked him what was to be done with the copy, he told them not to set it; that other tenders of services were made after that time, which were refused; that one witness testified that Adams admitted that there had been an agreement subsequent to the first one, that five dollars additional should be paid for the extra trouble in editing the daily; and that there was testimony, given by editors,

that the increased labor in editing the daily, was worth that additional sum. By an agreement relating to the matters in controversy, dated 27th June, 1854, it is stipulated "that from that time, the plaintiff is to be considered as holding himself in constant readiness to fulfill his part of the contract." The jury found for the plaintiff. The instructions asked and given, and the questions which arose, will be given in the opinion of the court.

Smith, McKinlay & Poor, for the appellant.

We take the grounds:

1. That the instructions were good law as asked for, and were applicable to the evidence and testimony, as will be seen by reference to the bill of exceptions.

2. That the qualification of the court materially changed the instruction and its efficacy.

3. That even if the qualification was immaterial, still that it was sufficient to lead the jury to believe that the instructions as asked for were bad law. That is to say, we hold it to be error to qualify an instruction which, in its original form, is good law and is applicable to the case.

And *First*, One of the points in issue was, whether the old contract had been abandoned; this might be made out by acts as well as by words; his leaving the office and not editing the daily or *weekly* for several days, were facts tending to show that the contract was abandoned; he should have remained and insisted on performing the contract, if he intended to treat the contract as of force, and to hold Adams to it also.

Second. Tifield's leaving might be voluntary in one sense, and compulsory in another. He might not wish to leave, and yet he might prefer to leave and not perform his part of the contract he now alleges to have been in force, rather than stay at twelve dollars a week, or stay and abide the result of a settlement of their differences in some legal way. And so far as not wishing to leave, and not being convenient for him to leave then, his quitting may in that sense have been *compulsory;* but in making his election to quit, rather

than stay as above suggested, he acted *voluntarily;* neither Adams nor Hackley compelled him to quit. Hackley merely told him that he might leave, as his services were not wanted at $15 a week; and *he did leave.* Hackley did not drive him away; he might have remained if he chose, and taken measures for a proper settlement of their matters of difference.

But the insertion of the word *voluntary* into the instructions, led the jury to believe that without that word the instructions were bad law, and to believe that Tifield's leaving must have been *purely* voluntary, in order to warrant them in regarding it as an abandonment of the old contract. It led them to think that Tifield had the sole right to construe the relations he held with Adams or with Adams & Hackley, and that they, or either of them, had no right to contradict him.

In support of the third point, we refer to *Raver* v. *Webster*, appealed from Jones county, (supposed,) December term, 1854; *Ivey* v. *Phifer*, 11 Ala. 535; *Clealand* v. *Walker*, 11 Ala. 1058; *Hinton* v. *Nelms*, 13 Ala. 222; *Cole* v. *Spann*, 13 Ala. 537.

The fourth instruction asked for, and which was refused by the court, is: "That if Tifield did not wish to abandon the first contract, then he should have refused to quit; but if the jury believe that he did quit, and that he was absent for several days from the office, that Adams had a right to refuse to receive his copy which he brought after they failed to make a new contract."

Tifield was told he might quit, as his services were not wanted at $15 a week—that is, his services for the Daily, Tri-Weekly and Weekly Tribune. If he intended to hold Adams to the original contract for the weekly, he should then have refused to quit. Having quit when permission was given him, and having remained absent for several days, while, in the meantime, the Daily, Tri-Weekly and Weekly Tribune was being edited by Hackley, Tifield had no right to bring the contract again into force, without the consent of Adams.

The eighth instruction asked for, and which was refused by the court, is: "That if the jury believe that, after the entering into the written contract, Adams took Hackley into partnership, and that after the formation of such partnership, Tifield performed work as editor of the Tribune for Adams & Hackley, and received pay from them; that such, by operation of law, amounts to an extinguishment of the contract between Adams and Tifield, and the making of a new contract between Tifield on the one part and the partnership of Adams and Hackley on the other."

In support of this position, we refer to Story on Partnership, 3d edition, page 253, note 2 to section 155; *Hart* v. *Alexander*, 2 Meeson & Welsby, 484; Story on Partnership, § 255.

By consent of parties, the jury were authorized by the court to seal up their verdict and hand the same to the clerk, by their foreman, and disperse. They did so. Their verdict was unsatisfactory to the plaintiff, and at his instance the jurors were re-assembled, the defendant objecting thereto.

As soon as the jury handed in their verdict and dispersed, their mission was at an end. See *White* v. *Martin*, 2 Scam. 69; *Miller* v. *Hoe*, 1 Branch, 189; 7 U. S. Dig., page 480, § 19; *Settle* v. *Alison*, 8 Georg. 201; 12 U. S. Dig. 587, § 4; *Sargent* v. *State of Ohio*, 11 Ohio, 472.

The court erred in rendering judgment on the verdict. The whole case shows conclusively that Tifield, by his entering upon the duties of the Daily and Tri-Weekly Tribune, assented, if not to an abrogation of the original contract, at least to such an alteration of it as to destroy its force, unless in its altered shape, or unless Adams should consent to discontinue the daily and tri-weekly. In that office, as is the usual mode in offices where a daily and weekly newspaper is published, the weekly was made up of the matter published in the daily, with the exception of a few articles, and so no editor was specially required for the weekly. Tifield consented to the publication of the daily, and was its editor for several weeks, and the weekly was made up from it; he had no right, when he and Adams

could not agree as to what his pay should be, to say that he would now edit the weekly only, and thereby throw on Adams the unreasonable and unprecedented expense of having different editors for different issues of the paper, and the necessary further expense of setting up the different matter for the different issues, and make the Tribune virtually two papers instead of being a daily and weekly issue of one paper.

It may be that the original contract was in force, but if so, it was not in force in its original form or effect, but only as a basis for the further contract for the daily and tri-weekly, in conjunction with the weekly. If in force, Tifield was entitled to ten dollars a week, and to as much more as he might have agreed for, if an agreement was made as to the compensation for the additional labor caused by the daily and tri-weekly, and if no agreement were made as to the additional compensation, he was entitled to the ten dollars, and as much more as the additional labor was really worth. This is the view we all along contended for, and we think it is the only reasonable view that can be taken of the case. It is perfectly unprecedented to compel a man to pay for services which are not rendered, *and which, if rendered, would be of no use.* Adams had no use for an editor of the weekly, specially as editor, so long as the daily should be published. And Tifield, by his acts, having consented that a daily should be published, had no right to compel Adams to discontinue the daily, or to accept Tifield's services as editor of the weekly, when the daily furnished almost all its matter. Therefore we say the court erred in rendering judgment on the verdict. The record, instead of showing a state of facts that would entitle Tifield to recover, shows precisely an opposite state of facts.

Wiltse & Blatchley, for the appellee.

The position is taken for defendant, that the evidence did not authorize the verdict of the jury, and the judgment of the court; that the evidence showed that Tifield himself abandoned the contract. When did Tifield abandon the

contract? Not at the time of his dismission, for Adams, Hackley, and Tifield had a conference two or three days afterwards, at which the contract was treated as still subsisting. Not at the time of this conference, for almost immediately afterwards Tifield tendered copy. The jury were plainly of opinion that Tifield at no time intended to abandon his contract, and that the quarrel picked with him was part of the game of Hackley to oust Tifield and take his place. Hackley succeeded, and holds the place to this day. This view is justified even by the imperfect summary of the evidence given in the bill of exceptions.

The question of the abandonment of his contract by Tifield, is one peculiarly within the province of the jury, and their decision of the matter will certainly not be overruled by this court, unless their decision was manifestly wrong, and unless all the evidence which was before the jury is spread before this court. This the bill of exceptions does not purport to do. It does not even give the names of the numerous witnesses who testified in the case. We understand the rule to be thoroughly established here, that this court will not reconsider a question decided by a jury, unless the bill of exceptions shows affirmatively that it embraces all the evidence on which the jury formed their opinion; and there certainly never was a case which came more clearly within the technical requirements of this rule than the present, nor one which, in its circumstances, better illustrates its justice and necessity.

Defendant insists that the court below erred in qualifying and refusing certain instructions. The great point made in the case by defendant was, that Tifield himself abandoned the contract, left Adams of his own accord, and the instructions were intended to affect the jury in this connection. All that the court did, was to provide against any inference which the jury might draw from the instructions, that Tifield should have stayed in the office until he was bodily expelled. Hackley, the business manager of the printing office, the partner and agent of Adams, had told T. his services were not wanted; had taken away the key to the post-office box;

had taken away the exchanges. It certainly was not necessary after this to stay in the office, insisting on going on with his work under the contract, till he was kicked down stairs. The jury were not to be instructed that, because he quit the office under such circumstances, he abandoned his contract. The propriety of the refusal of an instruction to this effect, and the propriety of qualifying other instructions by the word voluntarily, is therefore, we think, apparent even from the meagre account of the testimony and trial contained in the transcript.

Defendant makes the point that Tifield, in editing the paper after the formation of the partnership between Adams and Hackley, worked, not under the contract for Adams, but under a new contract for the firm; that the editing the paper after the partnership was effected, destroyed *per se* and by operation of law, the separate contract with Adams, and released him from all obligations under it. This is a strange doctrine, and we cannot see that it receives the slightest countenance from the authorities cited to support it. Whether or not Adams formed a partnership, Tifield had no right to interfere on the ground of anything in his contract. If Adams chose to have the aid of a partner to assist him in carrying on the printing business, involving, among other things, the fulfillment of his contract, with himself, could Tifield object? By the formation of the partnership, the proprietorship of the Tribune vested in Adams & Hackley, and if Tifield edited it at all, he must in one sense work for the firm. Was, therefore, Tifield authorized to claim that he was released from all obligations under the contract; that by operation of law the contract was dissolved? If the partnership was inconsistent with the contract, then Adams in taking a partner violated the contract, and Tifield was authorized to abandon the office immediately, and sue for damages. The parties to it evidently regarded the contract as still in force under the partnership, and, as has already been said, even so late as two or three days after Tifield's dismission, it was expressly recognized as still subsisting.

Defendant makes a point of what occurred during the

trial. The jury, when out, first returned a sealed verdict and dispersed. The verdict was simply for plaintiff, "according to the contract." The same jury were assembled again, and instructed to find the amount due. This, of course, was to be ascertained by multiplying the number of weeks during the life of the contract, after dismission, viz: forty, by ten, the number of dollars per week due under the contract. This was all the jury had to do—a mere matter of calculation and form, which we submit might have been done by the clerk. There was never any dispute between the parties as to how much was due, provided anything was due. The grand question in dispute, and which a jury was wanted to decide, was whether Tifield was entitled to any damages; whether Tifield abandoned the contract, or Adams dismissed him? These, the substantial questions in the case, the jury, by their original sealed verdict, decided in favor of Tifield. These being decided, the whole case was decided. If Tifield was entitled to a cent "according to the contract," nobody ever doubted that he was entitled to $10 a week. There is no question as to the perfect fairness and regularity of the sealed verdict, and that decided the question whether Adams had violated the contract, and Tifield was entitled to damages, and there is therefore no reason for a new jury to decide that. The question how much—a mere question of figures and multiplication, about which there is no issue and no dispute—surely a new jury is not required to settle this. It is plain that defendant has suffered no harm—the grand issues which he presented have been decided with fairness and unexceptionable regularity. Why, then, should he have a new trial?

The examination of authorities which we have made, does not favor the idea that when the amendment to the verdict could not possibly injure the defendant, and especially when it might be regarded rather as a mere matter of form than otherwise, the courts will decree a new trial. *Vide* 18 Vermont, 180; 2 Vermont, 562.

Four or five juries in the justice's court and in the District Court, have decided the grand questions involved in

this case, as they are decided by the verdict under consideration. It would seem about time to consider them settled.

As to liability of defendant to pay plaintiff while waiting on him, *vide* 2 Greenl. Ev., § 261, and note.

WOODWARD, J.—The defendant requested the court to give the following instructions to the jury: 1. That if Tifield quit the office, either because he was not wanted, or because his wages were not high enough, such quitting may be regarded as an abandonment of the old contract; which the court gave, with this qualification: "If Tifield *voluntarily* quit," &c. To this qualification, the defendant excepted. He also asked the following: "2. That the fact that Tifield quit the office, and did not edit the weekly or daily for several days, and that they tried to make a new contract which would have superseded the old one, may be construed to be an abandonment of the old contract by both of the parties," which the court gave, with the qualification: "If his quitting was voluntary;" to which qualification the defendant excepted, and these are assigned as error.

We do not think these instructions are good law, in the form proposed by counsel. In the first one, the first supposed cause for leaving, "because he was not wanted," is vague and ambiguous. It implies a failure (at least) of employment under the contract, if it does not also imply a delinquency on the part of Adams, in furnishing such employment. It may also carry the idea, that there was an unwillingness in the latter to have him remain employed in the office. Under none of these circumstances, would his leaving amount to an abandonment on his part. The second supposed cause of leaving, because his wages were not high enough, may imply delinquency on the plaintiff's side, fairly enough, but as the party associated this with the other cause, which is bad, and could not be given without qualification, he must lose the benefit of this. The second of the above instructions requests the court to *assume* the fact, that T. did quit the office, and did not edit the paper for several days; and then to charge the jury that from that

fact, and from the parties having tried to make a new contract which should supersede the old one, they might infer an abandonment. The court was certainly right in refusing this. This court has been called upon to reverse judgments for the reason, that instructions to the jury assumed facts to be proven, and the District Court was correct in declining to do so. It went full far enough, in favor of the defendants, in giving the instruction with the qualified expression.

The defendant requested the following instructions: "That if Tifield did not wish to abandon the first contract, he should have refused to quit; but if the jury believe he did quit, and that he was absent several days from the office, Adams had a right to refuse to receive his copy, which he brought after they failed to make a new contract," which the court refused to give, and the defendant excepted. Although the court may, in its discretion, sometimes give instructions, with qualifying terms, yet it is not the *duty* of a court so to correct or limit them. It may refuse them totally, and leave the party proposing them to assume the hazard of their entire correctness. This instruction commences with taking for granted a fact, and that too, one which, if proved, would not benefit the defendant. That part of it also, which relates to the party's quitting, is totally unqualified in reference to the *cause* which may have influenced him to leave, if in fact he did so. We think the court did right in refusing to give this in charge. In these instructions the word "*quit*" needs explanation, in order to a perfect understanding. If it means leaving the office, that is an immaterial circumstance. If it means leaving the work of editor, then the assumption is contradicted by the testimony, which says that he continued to offer copy, and no other refusal to quit was called for than a silent continuance in the discharge of his duties.

The defendant further asked the court to charge the jury, "that if, after Adams took Hackley into partnership, Tifield performed work as editor for Adams & Hackley, and received pay from them; this, by operation of law, amounts to an extinguishment of the original contract, and

the making a new one between Tifield and the partnership. The court declined to give this instruction, and in this it did not err. Adams could not release himself from his contract, by entering into a partnership; nor does Tifield's continuance in the discharge of his duties, though during the existence of the partnership, imply a waiver of the first agreement. The burden is on Adams to show the substitution of a new arrangement.

A further error assigned, arises on the following facts: By the consent of the parties, the court authorized the jury to seal up their verdict, and hand the same to the court by their foreman, and disperse. They did so seal the verdict and separate. The verdict was opened and read by the clerk in open court. It was as follows: "We, the jury, find for the plaintiff, according to contract." The plaintiff moved that the verdict should be recommitted to the jury to be amended, which was done, the defendant objecting. The court instructed them, that they must "assess the amount of the plaintiff's damages, allowing the defendant all credits to which he is entitled." The jury returned the verdict in the same terms as before, with the addition of the amount of damages found. It does not appear to us that this proceeding is erroneous. The practice of permitting a jury to separate, after agreeing upon and sealing up their verdict, is common with us, and is convenient, especially when the jury is sent out at a late hour in the day. But the practice should be carefully guarded against all abuse. Usually the jury is assembled in their box before the verdict is opened, and this should be the course. It is possible that in the present case, the defendant intends that the court shall infer, that the jury were not re-assembled before the verdict was opened. This is not apparent. If such was the fact, and if it would change the case, the defendant's bill of exceptions should have made it clear. The *inferences* are to be in favor of the court. We do not stop to determine whether this would make a difference, but take the facts in the present instance to have been according to the usual practice. In all cases of the rendition of a sealed verdict,

the court should be careful to have the jury present at the opening of the verdict, if it be at all practicable; for this is the only opportunity for the correction of the verdict, when it is so informal that it cannot be rectified by the court, as in the present cause. In *Douglass* v. *Tousey*, 2 Wend. 352, it was late in the evening when the cause was committed to the jury. The judge, without the express consent of counsel, directed them to seal up their verdict, and bring it in the next morning. They presented it, and when polled one of them refused to agree to it. They were sent out again. It was held to be no error. This case is very analogous to the one at bar. See also *People* v. *Douglass*, 4 Cow. 26; 1 Cow. 221; 5 Cow. 283; *Bunn* v. *Hoyt*, 3 Johns. 255; *Lawrence* v. *Stearns*, 11 Pick. 501.

It is further to be remarked, that in the present case, in order to abbreviate the proceedings, and to save trouble and expense, the parties entered into an agreement, by which it is provided, that if the verdict be in favor of plaintiff, judgment shall be entered for the whole amount which, under such finding, would be due under the contract to the plaintiff up to the time of rendering judgment." It would appear from this agreement, that the only real question between the parties was, whether the defendant was still liable on his original contract, and that if he was, the *amount* was determinable by the contract itself. Almost might the clerk himself compute the damages on this agreement. There was nothing to be done by a jury, beyond what is to be done on a promissory note, except the ascertainment of the payments to which the defendant was entitled. We recognize the thought, that the purity of trial by jury is to be guarded with undiminished jealousy, but we do not think it has been in the least degree contaminated in the present instance. The judgment of the District Court is affirmed.

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RAVER *v.* WEBSTER *et al.*

In an action on an attachment bond, the record and proceedings in the attachment case, is competent evidence on the part of the plaintiff.

Where in an action on an attachment bond, executed in an action for tort, in which the defendant was charged with wrongfully and fraudulently breaking open a letter intrusted to him by the plaintiff, and which contained instructions to the agents of the plaintiff in relation to the entry of certain lands, the petition alleged that the attachment was sued out *willfully wrong*, and claimed exemplary damages; and where on the trial, the defendant offered a witness to prove that the plaintiff had stated to him, that he had opened the letter, as alleged in the petition in the attachment case, which evidence was objected to, and rejected by the court; *Held*, That the evidence offered had a tendency to show, that the defendant had reasonable ground for believing what he stated in his affidavit for the attachment, and was admissible.

Where the petition in an action on an attachment bond, charges that the plaintiff in the attachment acted *willfully wrong*, and seeks to recover exemplary damages, the true issue is, whether the plaintiff in the attachment, made the affidavit for the writ in good faith, and with full belief that the allegations therein contained were true.

The word "wrongfully," as used in section 1584 of the Code, means unjustly—injuriously—tortiously—in violation of law.

To make the act of the creditor in suing out an attachment, *willfully* wrong, and entitle the debtor to exemplary damages, it must appear that the creditor procured the attachment, without any reasonable ground to believe the truth of the matters stated in the affidavit for the writ, and with the intention, design, or set purpose, of injuring the defendant.

A court is not required to give the same instruction as often as it may be asked, but has a discretion to refuse it, after it has been once clearly given.

Where in an action on an attachment bond, the court instructed the jury as follows: "That the advice of counsel will go to rebut the idea of malice, but the defendant must prove that he submitted his case to an attorney; and that on the case submitted, he was advised by such attorney, that he had a good cause of action, and a right to sue out an attachment. When proved, it will save him from exemplary, but not from actual damages;" *Held*, That the instruction was substantially correct.

And where in such an action, the court refused to give an instruction as follows: "That if the jury are satisfied that the defendant was advised by counsel, practicing in this court, that the facts set forth in his petition, did constitute a legal cause of action, it will be a sufficient justification for bringing the suit, notwithstanding the attorney may have erred in his advice; "*Held*, That the instruction was properly refused.

In an action *not* founded on contract, the plaintiff is not entitled to an attachment, on the ground, that the defendant has property, goods, money, lands,

and tenements, or choses in action, not exempt from execution, which he refuses to give either in payment or security of the debt.

The act entitled "An act to amend section 1848 of the Code of Iowa," approved January 24, 1853, applies alone to actions founded on contract.

Where in an action for tort, an attachment was sued out, for the cause that the defendant has property, goods, money, &c., which he refuses to give either in payment or security of said debt; and where in a subsequent action on the attachment bond, for wrongfully and willfully suing out the attachment, the plaintiff asked the court to instruct the jury, "that the affidavit for the attachment set forth no sufficient cause for the attachment, for the reason that the act of 1853, applied alone to actions founded on contracts," which instruction was given; *Held*, That the instruction was properly given.

Appeal from the Jones District Court.

THE defendant Webster, sued the plaintiff Raver, for a tort, and procured an attachment against his property. The affidavit stated, "that said Raver had money, goods and chattels, lands and tenements, which are not exempt from execution, which he refuses to apply to the payment or security of said damages, though requested so to do by your petitioner." On the trial of that action, there was judgment for Raver. He now sues on the attachment bond, alleging that the attachment was sued out *willfully wrong*, and claiming exemplary damages. During the trial, certain testimony was offered by defendants, and rejected—and certain instructions given and refused—to which they excepted. They now appeal, and the errors assigned, as well as the further facts of the case, will sufficiently appear from the opinion of the court.

Smith, McKinlay & Poor, and *W. J. Henry*, for the appellants.

H. O'Connor, for the appellee.

WRIGHT, C. J.—The first assignment is, that the court erred in admitting the record and proceedings in the original case, in evidence against the sureties in the attachment bond. There can be no question as to the admissibility of

this evidence. Of its competency, there can be no doubt. Among other matters contained in this record, was the bond on which the suit was brought, as also the affidavit and judgment. Was it not material for plaintiff to show these matters? Indeed, without the record in the original case, how could any plaintiff ever sustain an action upon an attachment bond? It seems to us, to be the most pertinent and necessary evidence that a party could introduce in such cases. Its conclusiveness raises another question, which is made by the second assignment of error, which we next proceed to notice.

In the attachment suit, Webster sought to recover damages for the alleged wrongful and fraudulent act of Raver, in breaking open a letter intrusted to his care by Webster, which contained instructions from him to his agents, in relation to the entry of certain lands. On the trial of this case, as shown by the bill of exceptions, the defendants introduced a witness, by whom they proposed to prove, that said Raver had stated to him, that he had opened the letter, as alleged in the petition of Webster, which testimony was objected to by plaintiff, and the objection sustained.

To determine this question, it becomes necessary to first ascertain what is the true issue in this class of cases? Is it that the defendant in the attachment was not, in *fact*, indebted to the plaintiff in the manner charged? Or, to take a case of more frequent occurrence in practice, is the issue whether the defendant, at the time of making the affidavit, *was in fact* a non-resident of the state; or, in fact, about to dispose of his property, with intent to defraud his creditors; or, in *fact*, about to do, or refuse to do, any one of the things which entitle the creditor to an attachment? Or, on the other hand, is the true issue, whether the affiant as a reasonable, prudent, and cautious man, had *good reason* to believe, and did believe, what he stated as true?

And notwithstanding the rejection of this testimony, would seem to indicate that the court below regarded the issue *first* stated, to be the true one, yet the instructions given would tend to show that the *latter*, was the one submitted to the jury,

for we find the following instructions asked by defendants, and given by the court:

"12. That the petition in an attachment cause, and verdict and judgment therein, are not in themselves, in all cases, sufficient evidence that the attachment was willfully wrong."

"13. That it cannot be presumed against Webster, that he willfully swore to an untruth; that the verdict and judgment against him in the other case, are not of themselves, evidence that the petition in that case, was untrue, but merely that Webster failed to prove it before the jury; or that if true, they considered it no cause of action."

"14. That the verdict and judgment in the other case, are not of themselves sufficient to rebut the presumption, that Webster made affidavit to the petition in good faith, and with full belief that the allegations therein made were true."

Now, we think it quite manifest that if these instructions are correct, (and especially those numbered 13 and 14,) then the testimony offered should have been received. For to say that the former verdict and judgment were not in themselves evidence, that the petition therein was untrue, and that they were not of themselves sufficient to rebut the presumption that he made the affidavit in good faith, and with the full belief that its allegations were true, would seem to recognize, either the necessity for further proof on the part of the plaintiff to sustain his action, or that defendants might be allowed to show, notwithstanding said verdict and judgment, that the affidavit was made in good faith. And in either event, the testimony offered would seem to be pertinent. For certainly if the question of good faith was subject to inquiry, after the judgment in the original action, the testimony as to what Raver said in relation to the breaking open the letter, as charged in the original petition, if brought home to Webster, before making the affidavit, would be quite material for the consideration of the jury. But if, on the other hand, the true inquiry in such cases is, whether the affidavit is true in *fact*, or in this case, whether Raver was in *fact* liable in damages for the matters stated in the original petition, then it seems to us that the judgment would conclude the parties

on that issue, and further, that these instructions were incorrect, and this testimony inadmissible. Which, then, is the true issue?

Without now determining what would be the rule, where damages are claimed for the *wrongful* issuance of the attachment, we incline to the opinion, and so hold, that in the case before us, where the petition charges that the plaintiff in the attachment acted *willfully wrong*, and seeks to recover exemplary damages, the true issue is, that made and presented by the instructions, and that the testimony offered, was, therefore, improperly rejected.

Our law provides that the plaintiff in attachment, shall give bond, conditioned that he will pay all damages which the plaintiff may sustain by reason of the wrongful suing out of the attachment. In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was *wrongfully* sued out, and if *willfully wrong*, he may recover *exemplary* damages; nor need he wait until the principal suit is determined before he brings suit on the bond. Code, § 1854. By "wrongfully," as here used, we understand is meant—unjustly—injuriously—tortiously—in violation of right. To make the act of the creditor *willfully* wrong, and entitle the debtor to exemplary damages, something more is necessary. It must appear that he procured the attachment without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose, of injuring the defendant. And, therefore, the inquiry where exemplary damages are claimed, is, did the plaintiff act willfully, or with the design and intention of injuring the defendant? and as a consequence of this, though he may fail in his action, he is not, therefore, precluded from showing in an action brought on the attachment bond, that he acted in good faith, and at the time he made the affidavit, he had good reason to believe that he had a just and valid claim against the defendant. The judgment against him, it is true, was a judicial determination of the matters then in litigation, and the correctness of that finding, could not again be drawn into controversy. It may, therefore, be admitted

that by the judgment, it was authoritatively determined, that plaintiff had no such claim against defendant as was set up in his petition. And yet, it would not follow as a consequence, that he had not good reason to believe that he had, or that he might not in good faith, and with no intention or design to injure defendant, have made the affidavit, and procured the attachment. The issues, we think, are quite distinct.

Let us by a brief reference to what we understand to be some of the circumstances of this case, further illustrate our position. As before stated, Webster charged Raver with having broken open a letter, and thereby to have obtained information which induced Raver to proceed at once to enter the parcel of land, which by the letter Webster had instructed his agents to enter for him, whereby he, Webster, was injured, &c. From the instructions in the case, it also seems, that before obtaining his attachment, Webster consulted an attorney, and probably acted under his advice and direction. Now, the very character of the charge was such as to make the proof of it, in most instances, quite and even extremely difficult. This fact should perhaps, have counseled care on the part of the affiant, before making so serious a charge against defendant. And yet the circumstances within his knowledge, after the most careful inquiry, may have been such as to produce the clearest conviction on his mind, of defendant's guilt. Other circumstances may have developed themselves subsequently; the defendant may have shown many facts in his defence; all of which, when known and proved, may have satisfied the plaintiff, as they did the jury, that there was no just foundation for the charge. But to make the finding of the jury as to the fact of the indebtedness, or as to the truth or falsity of the charge made in an action for a tort, conclusive evidence of the intention of the affiant, to injure the defendant, is, in our opinion, to disregard the consideration of those circumstances upon which he acted, and to leave out of view entirely the motive by which he was in fact governed. Suppose a number of persons, of whose veracity he had no reason to doubt, had told him be-

fore making this affidavit, that Raver had, in their presence, broken open this letter; or that he had told them, that he had broken it open; and before the trial of the original action, they had died, or for some cause their testimony could not be obtained, or when called on to the stand in that trial, they had denied all knowledge of anything of the kind, would it do to say, that because plaintiff under such circumstances, had failed in his action, he could not, when sued on the bond, in order to show the good faith with which he acted, prove by other persons, that these witnesses had stated to him these facts? We think most clearly not. And thus we might, in various ways, illustrate the impropriety of making the judgment conclusive, but these must suffice.

The judgment may be sufficient evidence that there was, in fact, no ground for the institution of the suit, but to make it conclusive that the plaintiff had no reasonable grounds to believe what he stated, and acted willfully wrong, we think, is giving it too much effect. As the testimony offered, therefore, had a tendency to show that he had reasonable grounds for believing what he stated in his affidavit, it was admissible. We say it had a tendency to prove this. Of course, it must be shown that it was known to the affiant at the time of making the affidavit. If not known to him, he could not have acted upon it. No objection of this kind was made to its introduction, however, and it was the right of the defendants to first prove the fact, and bring it home, if they could, to the affiant. If they fail in thus bringing it to his knowledge, it should of course be rejected.

The disposition of this question, must reverse the case. Several other errors are assigned, however, which we will briefly notice, as they may arise in a subsequent trial.

It is claimed that the sureties, by the *terms* of the bond, are not liable for the damages sustained, *after* the making of it, but only for those sustained *before* that time. To this, we answer, that no such point was directly made or determined by the court below. That court was not called upon to give a construction to the bond itself. At least, no construction was given adverse to that urged by appellants. On the con-

trary, the instructions on this point, as far as they go, are quite as favorable to them, as they can reasonably ask. They have certainly no reason to complain.

It is next objected, that an instruction numbered four, was improperly refused. We think, that another instruction asked by defendants, and given, covers substantially and sufficiently the same ground, and there was, therefore, no error in refusing the fourth. A court is not bound to give the same instruction, as often as it may be asked, but has a discretion to refuse it, after it has been once clearly given. And it would be well, in our opinion, if this discretion was more fully exercised.

During the progress of the trial, the court, at the request of the plaintiff, instructed the jury, that "the advice of counsel will go to rebut the idea of malice, but the defendant must prove that he submitted his case to an attorney, and that on the case submitted, he was advised by said attorney, that he had a good cause of action, and a right to sue out an attachment. It is for him to make out this defence, and he must prove it. When proved, it will save him from exemplary, but not from actual damages." The defendant then asked the court to instruct the jury, "that if the jury are satisfied that the defendant, Webster, was advised by counsel, practicing in this court, that the facts set forth in his petition, did constitute a legal cause of action, it will be a sufficient justification for bringing the suit, notwithstanding the attorney may have erred in giving such advice," which instruction the court refused to give. In regard to these instructions, we need only say, that we think the instruction given, as asked by plaintiff, is substantially correct, or at least, we see nothing in the circumstances of the case, which would lead us to believe it to be incorrect. The one asked by defendant, goes too far. The fact, as there stated, might if proved, be a circumstance to be weighed by the jury in assessing damages, but the instruction assumes that it would be a sufficient *justification* for bringing the original suit. Without some further qualifications, the instruction was properly refused.

Another point made, and one of no little practical importance is, whether for the cause set forth in the affidavit, a party is, or is not, entitled to an attachment in an action not founded on contract.

The Code, (§ 1846,) provides that in an action for the recovery of money, the plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached on the commencement or during the progress of the proceedings, by pursuing the course hereinafter presented. Section 1848 provides, that "the petition which asks an attachment, must in all cases be sworn to. It must state that, as affiant verily believes, the defendant is a foreign corporation, or acting as such; or that he is a non-resident of the state; or that he is in some manner about to dispose of, or remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or that he has disposed of his property, (in whole or in part,) with intent to defraud his creditors; or that he has absconded, so that the ordinary process cannot be served upon him." And then, by sections 1849, 1850, and 1851, it is provided, that if the demand is founded on *contract*, the petition must state that something is due, *and as nearly as practicable the exact amount*, which amount is intended as a guide to the sheriff in making his levy, who is to attach property fifty per cent. greater in value, than the amount thus stated. If the demand is *not* founded on contract, the petition must be presented to some judge of the Supreme, District, or County Court, who is to make an allowance thereon, of the amount in value of the property to be attached, but this provision applies *only* to cases *in the District Court.*

In 1853, section 1848 was amended as follows: "That in addition to the causes for which an attachment may issue, as prescribed in said section, said writ shall be authorized upon the plaintiff's statement in his petition, sworn to as therein required, that the defendant is about to abscond, to the injury of his creditors, or that he has property, goods or money, or lands and tenements, or choses in action, not exempt from

execution, which he refuses to give either in payment or security of said debt." Laws of 1853, ch. 84, 143.

In this case, the court instructed the jury that the affidavit set forth no sufficient cause for an attachment, for the reason that the provisions of this amendatory law, applied alone to actions founded on contract. And while the question is not entirely free from doubt, yet we think, the spirit, if not the strict letter of the law, favors this ruling.

To allow an attachment under any circumstances, in actions for torts, is not allowed in many of the states; and never, unless under some other restrictions than those provided in actions on contract; and hence, under our Code, in such actions, some of the officers named, must make an allowance of the amount of property to be attached, whereas, in actions on contract, the filing of the affidavit and bond procures the writ. And while we are not inclined to give so strict a construction to any part of the attachment law, as will limit or restrain its full and legitimate operation, we are not disposed to extend its provisions in actions for torts, beyond what may clearly seem to be its intention and purpose. And, therefore, we would not recognize the right to an attachment in such cases, unless such was evidently the intention of the legislature. And in consonance with this, is the first argument we would present in favor of the ruling of the court below. To allow an attachment in actions on contract, even for the causes set forth in this affidavit, is an innovation upon the law, as it had stood from the organization of even our territorial government. This fact alone, should lead us to limit its operation to that class of cases, unless the other is also fairly included in its provisions. Again, this amendatory act, we think, contemplates that the claim sued on shall be liquidated or ascertained, or one which is susceptible of being rendered certain, without the judgment of a court. It contemplates the right of the creditor to *demand* payment or security for his *debt*, and a refusal on the part of the debtor to either pay or secure the *debt* as requested. And while we would not lay too great stress on the word *debt*, as here used, yet we are not at liberty to entirely disregard it.

We cannot suppose that the legislature used the word in any other sense, than that ordinarily and appropriately attached to it. And thus construed, we understand it to mean, to owe, or that which is contracted—from *debeo*, to owe—*debitum*, contracted—that which is due or owing from one person to another; that for which a person is held, or which he is bound to pay. Now, if one man assaults and beats another; if one shall slander his neighbor, or commit any other act, amounting to a tort or wrong; while he may be answerable in damages, yet we never speak of the amount to which the injured party may be entitled, as a *debt;* it is not set down by the business man ordinarily among his assets or liabilities, nor in any way do we regard it in the nature of a sum owing or due, as by contract.

But without pursuing this thought further, we turn our attention more particularly, to the other language of the law. To give a party the right to demand payment or security for the claim he may hold against another, presupposes almost necessarily, that his claim or demand is either in fact ascertained and settled, or that it may be approximated at least, by fixing a value on those things, or those services, which in every community, have some estimated or marketable worth. Else, on what basis would he proceed in demanding payment or security? Or if payment or security should be offered, for what amount? By whom or how, is the amount to be ascertained? If the defendant is willing to comply, where is the data from which the computation is to be made? It will be readily seen, that all these, and many other difficulties, would arise on the application of this law to actions for torts. The defendant must refuse to give his money or property in payment or security for the debt. There is something for him to do, or refuse to do, before he is liable to this process. And why shall he be liable for refusing to do that, which in many cases, would be almost, if not quite impossible, from the fact that neither party can tell what the debt or demand really is. A. breaks B.'s arm or leg, or as a surgeon, he treats some fracture in so unskillful a manner, that B. is deprived of the use of his limb; or he

accuses him of a crime, and is liable in an action of slander. B. thereupon says to him, "I demand that you pay or secure me for the damages I have sustained by your wrongful act;" to which A. responds, either that he does not owe him anything, or that he is ready to comply. Has B. the data, within the meaning of this law, from which they can proceed to estimate the amount to be paid or secured? Or if he has, according to his appreciation of the injuries received at the hands of A., is it probable that A. will agree with him? If experience in such cases prove anything, it is that parties would very seldom, if ever, agree, on the amount. The consequence is, that you make the defendant liable to an attachment, when he may be guilty of no wrong; when he is willing to do what he conceives to be his honest duty; and when it is the plaintiff, perhaps, smarting under his real or imagined injuries, who over estimates what is due from the defendant. Now, we suppose, that this law was intended *primarily* to meet a class of cases of the following character: The creditor has a known and undisputed debt against his debtor. It is due, and should be paid. His debtor has money or property, with which he can, if so disposed, either pay or secure this debt; he is appealed to for this purpose, and refuses. The law then says, in effect: this debt you are able to, and ought to pay, or at least secure; you refuse to do either; and your creditor upon making affidavit to that effect, may secure himself by attachment. We say, we think, this was the *primary* intention of the law. In its application it may, and we think, does include those cases of contract, where there may be dispute as to the amount due. And so there may be cases in tort, where the amount to be paid could be ascertained with perhaps less difficulty, than others founded on contract. But such would be exceptions—the rule is certainly the other way. And while there may be difficulties in applying the law to *all* actions founded on contract, which would not arise in *some* actions for torts, we nevertheless think, that as a *rule*, it was intended to apply to the one, and not the other.

We conclude, therefore, that this instruction was properly

given. How far the fact that such an affidavit did not entitle the party to his attachment, may affect his liability on the bond, is a question not now before us, and upon it we intimate no opinion.

Because there was error in excluding the testimony offered by defendants, the judgment is reversed, and cause remanded.

SAUM *et al.* *v.* STINGLEY *et al.*

On a bill to review a decree in chancery, on the ground that error is apparent on the face of the decree, the decree is to be treated as including the bill, answer, and other proceedings, (except the evidence at large,) and they may be looked into, for the purpose of ascertaining whether the alleged error exists.

In such a case, it is not permitted to go into the evidence at large, either to support the decree, or to sustain an objection to it.

Where, in March, 1855, certain heirs filed their bill for the specific performance of a parol contract for the sale of certain real estate, made with their ancestor, which bill alleged that the ancestor died in February, 1853; that the contract was made *about* two years and ten months previous; that the land was paid for by the ancestor, and he took possession of the same before his death; that the land was to be paid for in labor; that the labor had been performed; that respondent had declared since said purchase, that he was about paid for the land, and would have to make a deed; and that the ancestor was in possession at the time of his death; and where the respondents answered, denying the allegations of the bill, and after a hearing, the respondents were required to specifically perform the contract; and where the respondents filed a bill to review the decree, on the ground of error apparent on its face, which bill was dismissed for the want of equity; *Held*, that the bill was properly dismissed.

After a final decree, defective averments in the bill as to time and circumstances, are not of such a substantial character, that they can be reached by a bill of review.

Appeal from the Jones District Court.

IN March, 1855, the defendants, as the children and heirs of Andrew Stingley, deceased, filed their bill in chan-

cery against complainants, seeking the specific performance of a parol contract for the sale of certain real estate therein named. To this bill, respondents appeared and answered, denying specifically the allegations of said petition. The cause was heard at the September term, 1855, on the pleadings and evidence, (as appears from the decree,) and the respondents required to specifically perform the said contract. Previous to the September term, 1856, (but what date is not shown,) respondents (now complainants and appellants) filed this, their bill of review, (fully stating the previous proceedings,) to set aside said decree. At that term a motion was made to dismiss the bill, for want of jurisdiction and want of equity, which was sustained, and complainants appeal.

W. J. Henry, for the appellants.

Whitaker & Grant, for the appellees.

WRIGHT, C. J.—The basis of this bill is an alleged error in law, apparent on the face of the original decree, and not from any new fact or facts which have arisen since the rendition thereof. And this error is claimed to be shown in this: that from the decree, the contract was manifestly void by the statute of frauds. In determining this question, are we confined in our examination to the decree itself, or may we look into the entire proceedings, including the bill, answer, and other proceedings constituting the record? In England, the decree recites the substance of the bill and pleadings, and the facts on which the court found its decree. In this country, however, decrees in chancery are usually general, without any such particular reference or statement of facts. And yet, as we understand it, under our practice, on a bill of review, the bill, answer, and other proceedings, are as much a part of the record as the decree itself. It is not permitted to go into the evidence at large, either to support the decree or to sustain an objection to it, under either practice; for this would permit the inquiry, whether the

deductions of the court were right or wrong from the evidence, whereas the true inquiry is, whether the decree is right or wrong on the face of it. *Whiting* v. *Bank of United States*, 13 Peters, 6; *Perry* v. *Philips*, 18 Ves. 178. It will be seen, therefore, that the practice in both countries is substantially the same. In the one, the decree recites those matters which, in the other, constitute the record, and virtually become a part of the decree; and therefore, when under our practice we speak of such a bill, as being brought to correct an error apparent on the face of the decree, the decree is to be treated as including the bill, answer, and other proceedings, (not including the evidence at large;) for it is only by a comparison with such proceedings, that the correctness of the decree itself can be ascertained. Story Eq. Pleadings, § 407, citing the following: *Tomlinson* v. *McKaig*, 5 Gill, 258; *Dexter* v. *Arnold*, 5 Mason, 311; *Webb* v. *Pell*, 3 Paige, 368; *Hollingsworth* v. *McDonald*, 2 Harr. & John. 230. In the case before us, the original bill charges a parol contract for the conveyance of the land; that it was paid for by the ancestor, and that he took possession of the same before his death. The answer denies all the allegations of the bill, but does not set up the statute of frauds. Without stopping to inquire, whether such specific denial of the bill would give the respondents the right to insist upon such statute, without pleading the same, we conclude, for another reason, that there is no such error in law, apparent on the face of the decree or proceedings, as will justify this bill, and that it was correctly dismissed by the court below. The bill avers payment and possession of the premises by the ancestor. It is not so specific in its averments, as to the time and circumstances of possession, as the most strict rules of pleading would require. But such defects are not of such a substantial character, as can be reached after final decree, in a proceeding of this kind. Assuming, then, as we do, from the record, that there was payment of the purchase money and possession, the case was taken out of the operation of the statute.

Appellant's counsel insist, however, that this contract was

made before the first of July, 1851, and that, independent of the Code, such payment and possession would not give the party a right to relief. On this subject, we need only say, that the record does not conclusively show that such contract and possession was made and taken before the Code took effect, and this should appear before the objection could avail, if available even under the law as it stood before that time. The bill alleges that Andrew Stingley died in February, 1853, and that the contract was made *about* two years and ten months previous; that it was to be paid for in labor; that the labor was performed; and that Saum has declared, since said purchase, that he was about paid for the land, and would have to make a deed; that possession was taken; and that their father was in possession at the time of his death. The averment as to the time of the contract, would not preclude proof that it was made at another and different date. The decree itself is silent on this subject, and the subsequent admission of Saum, as to payment, and his liability to make the deed, as well as the possession of the ancestor, which we can well assume were subsequent to the taking effect of the Code, we think relieve the proceedings of any supposed error in this respect, apparent on their face. Code, § 2411.

There are other considerations quite as conclusive, which might be referred to in support of the ruling of the court below, in dismissing the bill for want of equity. But as the foregoing are, to our minds, entirely satisfactory, and dispose of the case, we need not place the opinion upon other grounds.

Judgment affirmed.

WILLIAMS *v.* TRIPLETT.

Where the maker of a promissory note, payable in personal property at the option of the maker, indicates to the payee his election to deliver the property according to the tenor of the note, and the payee refuses to receive the property, the maker of the note is so far relieved from the duty of tendering the property, or setting it apart for the payee, that the obligation cannot be converted into a money demand, nor its payment as such enforced, without a further demand for the property upon the maker.

Where once the election is made by the maker, to pay in specific articles, and notice given by him to the payee or holder of the note, of his readiness to deliver them, a refusal to receive them discharges the maker, until a subsequent demand shall revive his liability.

Where suit was brought on a promissory note, payable on or before a given day, and which contained the following provision: "which may be discharged in good merchantable brick, delivered in the city of Keokuk, at cash price;" and where the defendant answered, admitting the execution of the note, and averring, that he has all the time been ready to deliver said brick; that he was ready to pay the note, at the time it was due, in good merchantable brick, delivered in the city of Keokuk, at the cash price; and that he so informed the plaintiff at the time the note was due, and plaintiff refused to accept the same, which answer was demurred to; and where the court sustained the demurrer, and rendered judgment for the plaintiff for the amount of the note; *Held*, That the demurrer was improperly sustained.

Appeal from the Lee District Court.

THIS was a suit on the following note: "$250.00. Keokuk, February 25th, 1856. On or before the first day of May next, I promise to pay to the order of William C. Williams, two hundred and fifty dollars, and interest thereon at the rate of ten per cent. per annum; which may be discharged in good merchantable brick, delivered in the city of Keokuk, at cash price. John Triplett." The defendant, by his answer, admits the making of the note sued on, and avers that he has all the time been ready to deliver said brick; that he was ready to pay the note at the time it was due, in good merchantable brick, delivered in the city of Keokuk, at the cash price; and that he so informed the plaintiff at the time the note was due, and plaintiff refused to accept the same. A demurrer to the answer was sus-

tained by the court, and judgment given for the plaintiff for $258.32. To the decision of the court, in sustaining the demurrer, defendant excepted, and the same is assigned for error.

George W. McCrary, for the appellant.

In the argument of this case, I shall endeavor to establish two propositions, viz:

1. That the amended answer sets out a sufficient legal tender of the brick.

2. The refusal of the plaintiff to receive the brick when so tendered, released the defendant from all liability on account of said note, and vested the title to the brick in plaintiff.

As to the first proposition: The Code of Iowa does not designate the acts which are necessary to be performed, in order that a tender may amount to a bar to a subsequent action, hence we must resort to the common law upon the subject, and the decision of the courts heretofore.

The first decision to which I wish to call the attention of the court, is the decision of the Supreme Court of our own state, in the case of *Games* v. *Manning*, 2 Greene, 251–3. This was a suit on a promissory note made by Games, for $300, "payable in leather, on or before January 1st, 1844, at his tan yard." The court will perceive that this was precisely such a note as the one sued on in the case at bar. In delivering the opinion in the case, the court said: "The obvious interpretation of the promise made by the note in this case is, that the specific kinds and quantity of leather should be ready for the plaintiff, at the place and on the day specified." And again the court says: "If the defendant had shown that he was ready to deliver the specific articles, according to the tenor and effect of the note, but *did not designate or set them apart*, it would have been incumbent on the plaintiff to prove a subsequent demand, or a refusal by the plaintiff to make the payment." Now, according to this decision, the defendant (Triplett) in the case at bar, did even more than was actually necessary, for he was not only

"ready to deliver the specific articles mentioned in the note, according to the tenor and effect of the note," at the time it was due, but "he *so informed the plaintiff, and plaintiff refused to accept the same.*" What more could he have done? He had the specific property. He had it at the *time* and at the *place*, and he notified plaintiff and asked him to receive it, which he *refused to do*, saying he did not need them. (See Answer.)

The case of *Johnson* v. *Baird*, 3 Blackford, 153, was an action on a promissory note, payable in hats, at a certain time and place. The defence set up was, that "at the time and place the note became due, the defendant was ready with the hats to pay and discharge the notes, but that no person attended to receive them, and that he had always been ready, and still was, to deliver them at the place appointed, if the plaintiff would attend to receive them." *This was held to be a good defence to the action.* By an examination of the answer, and amended answer, the court will perceive that the defence set up in the case at bar, and in the one first cited, are in substance, precisely the same, and almost the same in words. And I submit to the court, whether in view of the doctrine here laid down, the court below should not have overruled the demurrer of plaintiff.

The next decision I wish the court to notice, is in the case of *Mitchell et al.* v. *Merritt*, 2 Blackford, 89. In deciding this case, the court says: "If the defendants had been ready at the time and place to deliver, and found no person there to receive, they could have pleaded that fact in bar, with as much effect and with as little inconvenience, as they could an actual delivery, if there had been one."

In Chitty on Contracts, 7th Am. edition, p. 727, note, the court will see the law fully laid down, and it is there declared that if the defendant shows, that he "was at the place appointed at the proper time, ready to deliver the goods," the defence is good. In view of these decisions, and the other authorities cited, in the opinions to which I have referred, I think the court cannot for a moment doubt, that if the defendant in this case, was ready at the proper time and in the

proper place, to deliver the brick, according to the tenor and effect of the note, and he so informed the plaintiff, and plaintiff refused to receive the same, he is discharged from his contract.

But there is another view of this question, which I wish to notice briefly. The court will observe, that I have thus far in my argument, *assumed* that there was a particular place specified in the note where the brick was to be delivered. The language of the note is, "in the city of Keokuk." It seems to me very clear, that defendant brings himself within the meaning and intent of his contract, by delivering or tendering the brick anywhere in the city of Keokuk. But I will not stop to argue that question, because it certainly makes no difference to us, whether this be so or not.

I proceed now to discuss the question, supposing and assuming that this note is a "note for the payment of specific property, where no place of payment is designated,"—granting even that to be the case—still, I think, there can be no question but that the amended answer in this case, sets out a good and sufficient tender to bar the action. The question here arises, where is a tender to be made, when no place is designated? I answer, in the language of Bouvier, "at such reasonable place *as the creditor shall appoint.*" Bouvier's Institutes, 3d vol. 18.

We show in our answer, that we were ready to deliver the brick, offered to do so, and the plaintiff, *instead of designating according to law, the place where he would receive them, refused to accept them at all.* Our duty was then at an end; we had done all we could do. We had complied with the law, and more than that. And we had given him notice, so that he could have no excuse whatever, for refusing to designate a place, and receive the brick. The court will observe that there is a distinction made in the books, between *ponderous* articles, and those which are not ponderous. If the article is *not* ponderous or *cumbersome*, (see Chitty on Cont. 727, n.,) then it is proper, when no other inference can be drawn from the contract, for tender to be made, at the plaintiff's place of residence; but if the article be cumberous, (such as brick,)

then the plaintiff or vendee, must appoint a place to receive them. *Howard* v. *Miner*, 20 Maine, 325.

The court will also observe, by an examination of the note, referred to above, (Chitty's Con. p. 727,) that, "if the creditor, being notified, *refuses* or *neglects to appoint*, or avoids and prevents the notice, the debtor may appoint a place and deliver the articles there." Such is precisely what the debtor did in this case. Plaintiff having refused to receive them at all, much less appoint a place to receive them, he did all that remained for him to do. He complied with the requirements of his contract, as nearly as possible. He procured the brick and had them ready "in the city of Keokuk," and has since at "all times," kept them ready. It is clear, that he could have done no more; that it was necessary to do no more; and that unless the law is unreasonable and unjust in its demands, (and it is not,) he is discharged from further liability. As to my second proposition, there can certainly be no controversy, as the authorities are uniform on the point. Bouvier lays down the law in this very clear language: "A proper tender of the goods will pass the title to the creditor, and the debtor will be absolved from obligation." Bouvier's Inst. vol. 3, page 18. Our own Supreme Court, in the case before referred to, (*Games* v. *Manning*,) decided the question in the same way. The court say, that if a proper tender is made, "the debt is thereby discharged, and the property passes to the creditor." See also Chitty on Contracts, same note above referred to. In the case of *Mitchell* v. *Merritt*, 2 Blackford, 89, the Supreme Court of Indiana says: "By the tender and refusal, *or that which is equivalent*, the property becomes vested in the creditor, and his right to sue upon the contract is at an end." I have found no decisions adverse to these, and I presume the doctrine will not be questioned by the opposite counsel.

R. H. Harrison, for the appellee.

I submit to the court that in order to a sufficient legal tender of specific articles, something more than readiness to deliver, even when that readiness is made known to the

payee, is necessary. This is a note given for $250 in money, with interest, but which might have been discharged up to the day it was due, and not an hour beyond that day, in good, merchantable brick. See Transcript, page 1.

This is alternative, and "until *the day* of payment, the debtor may have his election, but after the day of payment is past, his right of election is gone, and the payee's right to demand money, is absolute." See *Church* v. *Peterson*, Penn. R. 301, and also, Chitty on Contracts, page 624, note. Did this defendant take the steps necessary to avail himself of this privilege of election, taking his answer as true, which is only done for the purpose of this demurrer? Most certainly not. These were ponderous articles, and there was no specified place of delivery, except the very general one of the "city of Keokuk." His first duty, then, was, to ascertain from Williams, at what place in the "city of Keokuk," he desired them to be delivered. If Williams refused to appoint a place, then Triplett might have appointed a convenient place and notified Williams, that he might attend and receive his property, if he saw proper to do so. This is so plainly the law, that counsel will hardly deny it, and the court most certainly will not need to be referred to authorities. And yet it is not averred in this answer, that such steps were taken.

A place of delivery is specified. This defendant, if he wished to have the benefit of his election, should on the day this note was due (not later), have at the place specified, delivered the brick by *setting apart and designating* them as the property of the plaintiff. "Where there is a contract for the delivery of specific articles *at a time* and *place* specified, the absence of the promisee at such time and place, does not dispense with such acts, on the part of the promissor, as are *necessary to vest* the property in the promisee." *Smith* v. *Loomis*, 7 Conn. 110, and also Chitty on Contracts, 8th Amer. ed. 623, note.

In 2 G. Greene, 254, the court say: "If the debtor makes a tender of the specific property he has promised, *and properly designate and set them apart* at the time and place

stipulated, and the creditor is not there to receive, *or refuses to accept* the property, the debt is thereby discharged, and the right of property in the articles thus *designated* and set *apart* at the time and place stipulated, passes to the creditor." On page 255—same case, *Games* v. *Manning*—they say, in commenting on the decision found in 3 Blackford: the reasoning of the court clearly shows, that something more than a mere readiness to deliver must be proved, in order to discharge the defendant from all liability on the contract. In order to keep those articles safe for the creditor, they must have been *set apart* or *designated* as the property of the creditor, and not remain *indiscriminately commingled* with like articles retained by the debtor, or owned by others." See also 2 Kent's Com. 507, 508; 4 Wend. 528, and 13 Ib. 95, 97; 7 Conn. 110; 4 N. H. 46, and 14 Vt. 457.

But it is useless to multiply authorities. The rule is firmly established, and has been so held by this court in the case of *Games* v. *Manning*, referred to. Not a step has been taken by Triplett to bring himself within the rule. He did not seek Williams to have a place specified. He did not at any place within the "city of Keokuk," proceed to set apart or designate any brick as tendered to pay the plaintiff this debt. Indeed, so deficient is this answer, that if it had been of money instead of specific articles, it would not have availed. A bare *refusal to receive the sum due*, and a demand of a larger sum, is not enough to excuse the *actual tender* of the *money*. See *Dunham* v. *Jackson*, 6 Wend. 22, and authorities there cited. How much less then, would a mere refusal, *for reasons* given, doubtless at the time, excuse in this case, a tender of specific articles?

Again; it was necessary to prove on trial, and consequently necessary to aver in the answer, in order to avail in bar, that these brick were counted; and the number should have been stated, that the plaintiff could have disproved the amount, if untrue. The number is not set out in the answer, and the error is fatal on demurrer.

Dorman v. *Elder*, 3 Blackford, 490, was an action for the non-delivery of hogs, worth a certain sum, and it was pleaded

in bar, that the hogs were *set apart* at the time stipulated, and that the plaintiff failed to attend. It was held by the court, "that the plea should have stated *the number* of hogs so set apart, and that they were kept at the place for the plaintiff, or that they were and always had been ready to be delivered."

For these reasons, I submit that the answer sets up nothing that can avail in bar of this action, and that the demurrer is well taken.

1. He did not seek Williams to ask a place of delivery, and as there was no specific place, this should have been done.

2. He does not aver that he ever even *offered* to pay the brick, but a bare *readiness.*

3. He does not aver that the brick were set apart at the time, and thus legally tendered to plaintiff.

4. He does not aver that the brick were counted out, that the plaintiff might know whether they were enough to meet the demand, and this was necessary before any tender could be made.

There has been no tender, actual or constructive, and not even an *offer* to pay is averred, but only a *readiness.* I will pursue this argument no farther, but rest firm in the conviction that this court will not unsettle a doctrine so fully established for many years, and re-affirmed by our own supreme bench.

STOCKTON, J.—The demurrer to defendant's answer, which was sustained by the District Court, presents only one question for our consideration, viz: was the plaintiff's right of action defeated, by his refusal to receive the brick, when notified by defendant, at the time the note was due, he was ready to deliver them according to his agreement? It is claimed for plaintiff, that something more than readiness to pay, is necessary to be offered by defendant, even when that readiness is made known to payee, and he refuses to receive the property; that it was defendant's duty to ascertain at what place in the city of Keokuk, the payee would have the

articles delivered; and when the place is specified, that defendant should deliver the articles at the place, by setting them apart and designating them as the property of payee; that if payee refused to designate the place, that then defendant may appoint the same, and notify payee to attend and receive the property; and that even the absence of the payee, does not dispense with such acts on the part of the defendant, as are necessary to vest the property in the plaintiff.

We readily concede that something more than an offer to perform by defendant, and refusal to receive on the part of the payee, is necessary, to discharge the defendant from all liability on the promissory note. But there is a clear distinction between the averment of sufficient facts on the part of defendant, to release him entirely from the obligations of his contract, as amounting to full payment or performance, and the averment of such facts only, as may defeat the present action, and excuse the defendant from the payment of the note, until plaintiff shall demand the delivery of the property, or notify defendant that he was willing to receive it. The defendant, by tendering the brick to the plaintiff, and properly designating and setting them apart for him, at the time and place stipulated, although plaintiff may not be present to receive them, or refuses to accept them, is discharged of his debt, and the right of property in the brick, thus designated and set apart, rests in the plaintiff. See Code, §§ 961, 963; *Games* v. *Manning*, 2 G. Greene, 254.

But it is not claimed, in the present case, on the part of the defendant, that he is discharged wholly from his obligation. He can only be so discharged by payment, or by tender, in the manner indicated above. Where, however, the debtor has notified the payee of his readiness to pay the note, by delivering the brick, and the payee refuses to receive them, we think the debtor is relieved from the further duty of tendering the property, or paying the note, until the creditor by subsequent demand, informs him of his willingness to receive it. In the present case, the defendant has indicated to the plaintiff his election to deliver the brick, according to the

tenor of the note. A refusal to receive them, so far relieves him from the duty of tendering the brick, or setting them apart for the plaintiff, that the obligation cannot be converted into a money demand, or its payment as such enforced, without a further demand upon defendant. When once the election is made to pay in the specific articles, and notice given by defendant of his readiness to deliver them, a refusal to receive them, discharges the defendant, until a subsequent demand shall revive his liability.

At the election of defendant, his obligation was to deliver to plaintiff, on a day certain, at the market price, good, merchantable bricks, in the city of Keokuk, to the amount of $250. On the day appointed, he had the brick ready to deliver, and so informed the plaintiff, who refused to receive them. This notice to plaintiff, we think, amounted to a request to him to appoint the place where the brick should be delivered by defendant. This was enough for the defendant to discharge him of this action. It was then not necessary for him to tender or deliver the brick. It is well settled, that a tender or delivery, may be dispensed with by the positive acts or declarations of the payee. *Gage* v. *Kendall*, 15 Wendell, 639: *Bellinger* v. *Ketts*, 6 Barbour, 281; *Stone* v. *Sprague*, 20 Ib. 509; *Slingerland* v. *Morse*, 8 Johnson, 473; *Tibbs & Clarke* v. *Timberlake*, 4 Littell, 12; *Barker* v. *Parkenham*, 2 Washington Circt. 142.

If we are correct in this view of the subject, then defendant is relieved of the necessity of ascertaining at what place in the city of Keokuk, plaintiff required the bricks to be delivered. After a refusal to receive them, he might well conclude that such an inquiry was dispensed with. The controversy between the parties is not, as we understand it, as to the place of delivery. It is, whether defendant may discharge his obligation in money, or in good, merchantable brick, at the market price. If he shows no excuse for his nonperformance, the plaintiff is entitled to be paid in money. This excuse, we think, he has shown in the refusal of plaintiff to receive the brick. And such being our conclusion,

we think the demurrer to defendant's answer, was improperly sustained. The judgment of the District Court is, therefore, reversed.

ZEIGLER *v.* VANCE.

Where one of the judges of the Supreme Court, is disqualified from taking part in the determination of a cause, from interest, consanguinity, or otherwise, and the decision of the court below stands affirmed, by reason of a division of opinion between the other two judges, the judgment does not differ from that pronounced in any other case, or in those cases in which there is a concurrence of the tribunal in granting or refusing the remedy sought.

Whether the judgment pronounced, shall be the result of concurrence, or non-concurrence, the sentence which follows is that of the law, and is alike under the control of the court during the term at which it is rendered.

The Supreme Court possesses the power to grant a rehearing in a case, which has been affirmed, in consequence of one of the judges of the court being disqualified from acting, and a division of opinion between the other two judges.

And where in such a case, after a rehearing had been ordered, a motion was made to set aside the order granting a rehearing, on the ground that the court had no authority to set aside the judgment of affirmance, the motion was overruled.

Under the rules of the Supreme Court, on applications for a rehearing, the opposite party has no hearing; and after a rehearing is granted, such party is entitled to a reasonable time in which to prepare for the re-argument, after being notified of the rehearing.

Appeal from the Muscatine District Court.

THIS cause was heard at the December term, 1855. WOODWARD, J., having been of counsel, took no part in its determination. It was continued under advisement, until the June term, 1856, at which time the judges hearing the same, being divided in opinion, an order was entered affirming the judgment of the District Court, as contemplated by section 1552 of the Code. At the same time, a petition for a rehearing was filed, the consideration of which was continued to the present term, and an order entered during the first week thereof, that the cause be reheard. The defend-

ant now moves for a reconsideration of the order granting the rehearing; that the same be set aside; and that the judgment of affirmance stand as the final adjudication of the cause in this court, for the following reasons:

1. There was no authority in the court, to set aside the judgment which the defendant obtained by operation of law.

2. The affirmance of the judgment was a legal right of the defendant, and the court had no power to interpose to defeat that right.

3. Whenever the state of facts contemplated in sections 1551 and 1552 of the Code, exists in relation to any case, that moment the case is beyond the reach of the court, and it is decided *by the law*, and not *by the court.*

4. The defendant's right, being a legal one, does not depend upon the *opinion* of the court, nor upon the merits of the cause, but upon *the state of the facts.*

5. Such a case is out of the ordinary track; the judgment does not depend upon the concurrence of the court, but upon the non-concurrence. It is *the law* stepping in, to restore order out of confusion.

J. Scott Richman, for the motion.

Whitaker & Grant, contra.

WRIGHT, C. J.—The determination of this question, involves the construction of section 1552 of the Code, which reads as follows: "Where the court is equally divided in opinion, the cause must stand for a re-argument, unless the the third judge is legally disqualified from serving. In such cases, the judgment of the District Court shall stand affirmed, but the decision is of no further force or authority." This section contemplates: *First.* A state of case, where one of the judges shall be absent, but who is not disqualified from taking part in the determination of the particular cause. In such a case, if a division of opinion occurs, the cause is to stand for re-argument. If, however, as in the case before

us, a division occurs, and such third judge is legally disqualified from serving, from interest, consanguinity, or otherwise, the judgment appealed from, is to stand affirmed. And the argument is, that the judgment in such an event, is not the result of a concurrence of opinion, but is, that judgment which follows as a legal and necessary sequence from the *non-concurrence* of those members of the court who alone can take part in the decision; that when such an affirmance takes place, the cause is beyond the reach of the court; that the rights of the parties are settled by the *law*, and not by the *court;* that on such non-concurrence, the defendant had a *legal* right to have the judgment of the court below stand; and that there is no power to afterward disturb or interfere with the right so acquired. Let us ask, what is a judgment? We answer, that in the broadest sense, under our law, it is the final adjudication of a civil action. Such final adjudication is not the resolve or decree of the court, but the *sentence of the law* pronounced *by the court*, in the action or question before it. The judgment is the *act of the law*, delivered by the court; or, as it is in some instances defined, the remedy *prescribed by the law*, for the redress of injuries, the suit or action being the vehicle or means of administering such remedy. With this definition in view, we are unable to see in what the judgment in this case, differs from that pronounced in any other case, or in those cases in which there is a concurrence of the tribunal in granting or refusing the remedy sought. If this court concludes that the judgment of the court below should be affirmed, this is but the sentence of the law, and the affirmance follows. If the conclusion is, that the action of the District Court has been erroneous, then the like sentence reverses the case, and the parties are, so long as such judgment shall stand, entitled and subject to all the rights and liabilities resulting from such an order. In either event, the *rights* of the parties are settled by the law, the court having only applied the law to the questions presented. So, in this case, the law contemplates the same deliberation; the same applications of the law; and if after such deliberation, it is considered—*consideratum est per curiam*—that the

two minds cannot concur, the law says, there shall be an affirmance. But suppose the two minds, upon more mature and further consideration, do concur in the application of the law, why may not the court act upon the question further, and pronounce what, after due deliberation, is believed to be the sentence of the law? Where there is concurrence in the first instance, the judgment is regarded as settling the rights of the parties. If, however, on application afterwards properly made, it should be considered, that the judgment pronounced was not the legal sentence which ought to follow, the question may be again considered, and the rights of the belligerents be again adjudicated; and whether the judgment pronounced, shall be the result of concurrence or non-concurrence, the sentence which follows is that of the law, and is alike under the control of the court during the term at which it is rendered. We can see no reason, in practice or theory, why the rights of a party in case of non-concurrence, are or should be more fixed or vested, or less liable to be disturbed or defeated, than when such rights are settled as the result of concurrence. We think the motion should be overruled.

Applications for rehearing are presented under the rules of this court, by the unsuccessful party. The opposite party has, on such applications, no hearing. In this case, the defendant states, that he had no notice of the order granting the rehearing, until yesterday; and that it will be impossible for him to prepare for argument at this term. We think that under such circumstances, he is entitled to a continuance. After the order affirming the case, he would not be bound to take notice of any subsequent steps taken by his adversary, or any action of the court, until notified thereof, and after such notice, was entitled to a reasonable time to prepare for the re-argument. Cause continued.

West *v.* The Steamboat Berlin.

Where in an action against a steamboat, for damages for the non-performance of a contract for the transportation of freight from Dubuque to St. Paul, the defendant offered as a witness, the master of the boat, who, being sworn on his *voire dire*, testified as follows: "I was captain and part owner at the time when the contract with the plaintiff was entered into. I have no interest in the present suit. I sold out before the present suit was instituted, and before it was thought of. Nothing was said about any claim on the part of the plaintiff, when I sold. It was not known then, that he intended any proceedings;" and was permitted to testify in chief, against the objection of the plaintiff; and where there was no evidence, showing who appeared as owners of the boat, or to whom the witness sold his interest in the boat, or upon what terms; *Held*, That the witness was properly admitted to testify.

All contracts are to be construed with reference to their nature and subject matter, and to the contingencies to which they are subject.

Where in an action against a steamboat, for the non-performance of a contract to transport certain pork from Dubuque to St. Paul, which contract was evidenced by five bills of lading, signed by the captain, all of which contained the words, "shipped in good order and condition," and the usual reservation of "unavoidable dangers of the river and fire, only excepted," and one of which contained the additional clause: "with the usual privileges," the petition alleged that the goods were not taken to their destination, but were stored and left at Reed's Landing, some eighty or ninety miles from St. Paul; and where the owners of the boat appeared and answered, that the pork was unmerchantable, and that the plaintiff sustained no loss by reason of the delay or otherwise; that at the time of the shipment at Dubuque, the plaintiff well knew, that the season for navigation from Dubuque to St. Paul had passed, and that the regular boats in said trade had withdrawn by reason of the lateness of the season, and the extra hazard of frost, ice, and severe weather, whereby the navigation was liable to be closed at any day; that the steamboat Berlin was a small boat, of limited capacity, not calculated by size or form for speed, and ran by daylight only, all of which was known to plaintiff; that the plaintiff, being desirous of sending a quantity of pork and flour to St. Paul, and other points, applied to the captain, to undertake the trip from Dubuque to St. Paul, and in order to induce him thereto, agreed with the captain, that if at any point on such trip, the farther navigation of the river should be found impracticable, by reason of the cold or stormy weather, or if the said captain should judge it unsafe and hazardous to proceed farther, then he might store said pork and flour, and return; that the captain, relying upon such contract, agreed to make the trip; that the plaintiff knew the goods were shipped on an open flat boat, to be towed by the steamboat, as well as on the steamboat; that at the time of making the bills of lading, the plaintiff falsely represented to said captain, that the said spe-

cial privileges stated in the agreement, were specially named and written in the bills of lading; that said captain, relying upon such pretences and representations, signed the same, without any explanation; that the boat with all due diligence, according to her capacity and custom, proceeded on her voyage; that the increasing severity of the weather, and the high winds then prevailing, hindered and delayed the boat, so that on arriving at Reed's Landing, near the foot of Lake Pepin, the farther prosecution of the trip became impracticable, and said captain determined that he could proceed no farther with an open flat boat, heavily laden in tow; that there being no means of forwarding the goods, they were stored until they could proceed at the opening of navigation in the Spring; that in February, 1854, the plaintiff took possession of the pork, so stored, and forbade the defendant having any farther power or control over the same, and so discharged defendant from any farther obligation under the contract; which answer also claimed pay for the freight, *pro rata*, and the new matter in which was denied by the replication; and where it appeared from the evidence, that pork was worth from $16 to $18, at Reed's Landing, and $20 at St. Paul; that the boat had a barge or a flat in tow, on which the freight was conveyed in part or wholly; that there was but one engineer and but one pilot, and he a *raft* pilot only, and not acquainted with the river above Lake Pepin; that the boat could run by daylight only, for some reason pertaining to herself, and not to the weather or the river; and that the freight agreed on was $1.50 per barrel; and where the captain of the boat testified as follows: "We (plaintiff and captain) both thought it might very likely happen, that the Berlin would not be able to reach St. Paul. Plaintiff said, 'if you can't get through, you can get part through.' When the boat started, plaintiff ran to the river bank, and said, 'if you can't get through, try and get to Charley Reed's, and deliver the goods there—he is the best man.'" And where the court instructed the jury as follows: "Although it is a general principle, that a written contract cannot be varied by parol evidence of instructions given before, or at the time the contract is executed, because all the terms of the agreement are supposed to be expressed and fixed by the instrument; yet you may take into consideration the instruction of the plaintiff to the captain, to store the goods at Reed's Landing, in the event he should be unable to go farther, for this is not a variation or contradiction of the written contract. I say, that so far as it would go to show, that the defendant was entitled to store the goods, if it was impossible for the boat to proceed farther, because of the dangers of the river and the closing of navigation, it would not be a variation, but on the contrary, as rather supporting it, for the bill of lading excepts the unavoidable dangers of the river, and reserves the 'usual privileges,' which is admitted to be the privilege of storing, when, by reason of unavoidable danger from ice, the farther prosecution of the voyage is impracticable;" to which the plaintiff excepted.

Held, 1. That the danger of interruption of the navigation, entered into, and became a part of the contract.

2. That a boat taking freight in November, to carry from Dubuque to St. Paul,

is bound to transport it to that place; but it is not *necessarily* bound to convey it there during the *same season*.

3. That if the navigation becomes *impracticable*, in consequence of the cold, the storms, or the ice of the season, the boat is excused from *then* fulfilling the contract, either on the ground of the act of the Higher Power, or because of the nature of the contract, and the contingencies which may well come within the contemplation and foresight of the parties, or in view of the clause excepting the unavoidable dangers of the river.

4. That under one or the other of these views, the boat had a right to stop and turn about, *if the voyage became impracticable*.

5. That the declarations of the plaintiff, as proven by the captain, were not to be viewed as varying the contract, or changing the liability of the boat, but were to be regarded only as directions *with whom* to store the goods, if the boat was obliged to stop.

6. That the instruction contained nothing but what pertained to the contract.

Where in such a case, the court instructed the jury as follows: "If at the time the goods were shipped, the plaintiff knew the character and capacity of the Berlin, and that it was necessary for her, in order to carry this freight, to tow in flat boats, and that she could run only in daylight, it would be your duty to consider that the contract was entered into by both parties, in reference to these things; and the plaintiff can only demand that the boat should make such speed as such a boat could reasonably make, and encounter only such obstacles and risks as she could encounter with safety. The question is not, what could a larger and better boat have done, but what could this boat have done, with due diligence? and this will refer, not only to the time when the goods were stored, but to any subsequent time during the season;" *Held*, That the instruction was erroneous, and should not have been given.

And where in such a case, the plaintiff requested the court to give the following instructions: "That it was the duty of defendant to have a boat, staunch, strong, and fit for the business of transporting freight from Dubuque to St. Paul, at the season of the year when the contract was entered into. 2. That it was the duty of the defendant, to have officers, engineers, and crew, sufficient in number and competency, to man the boat constantly, day and night," which instructions were refused; *Held*, That the instructions were improperly refused.

And where in such a case, the plaintiff asked the court to instruct the jury as follows: "That the good order in which the defendant admits by the bills of lading, the goods were received, refers only to the external condition, and not to the state of the pork itself, with reference to its soundness," which instruction was refused; *Held*, That the instruction should have been given.

Appeal from the Dubuque District Court.

THIS is an action against a steamboat, instead of against the owners thereof, under the provisions of chapter 120 of the Code. The action is brought upon five bills of lading,

signed by the captain of the boat, for the transportation of two hundred and thirty barrels of mess pork, from Dubuque in Iowa, to St. Paul in Minnesota, and ten barrels of the same from Dubuque to Port Douglass. The bills of lading are in the usual form, containing the words: "Shipped in good order and condition, &c.," and the usual reservations of unavoidable dangers of the river and fire, only excepted. But *one* of them, which is for one hundred barrels, contained this additional clause, "with the usual privileges." The petition alleges, that the contract has been violated in this, that the goods were not taken to their destination, but were stored and left at Reed's Landing, which is some eighty or ninety miles below St. Paul. The plaintiff claims damage for this non-performance of the contract, and as items of damage, he sets up the loss sustained by not getting the pork to St. Paul; the loss of insurance; the trouble and expense of going to Reed's Landing, to look after and take care of the pork; the charges paid; the laying out of the use of the money; and the trouble and expense of shipping the pork from Reed's Landing to St. Paul.

The owners of the boat appear to the action, and in defence, answer: 1. That the pork was unmerchantable, and that the plaintiff sustained no loss by reason of delay or otherwise; 2. That at the time of the shipment at Dubuque, the plaintiff well knew that the season for navigation from Dubuque to St. Paul was passed, and that the regular boats in said trade had withdrawn, by reason of the lateness of the season, and the extra hazard of frost and ice, and severe weather, whereby the navigation was liable to be closed at any day; that the steamboat Berlin was a small boat of limited capacity, not calculated, by size and form for speed, and ran by daylight only; all of which was known to the plaintiff; that the plaintiff being desirous of sending a quantity of pork and flour to St. Paul, and other points, applied to John F. Noel, then in command of the boat, to undertake a trip from Dubuque to St. Paul, and in order to induce him thereto, the plaintiff agreed with said Noel, that if at any point in such trip, the further navigation of the

river should be found impracticable, by the reason of the cold or stormy weather, or if the said Noel should judge it unsafe and hazardous to proceed further, then he might store said pork and flour, and return; that said Noel, relying upon such contract, agreed to undertake the trip; that the plaintiff knew the goods were shipped upon an open flat boat, to be towed by the steamboat, as well as on the steamboat; that at the time of making the bills of lading, the plaintiff falsely represented to said Noel, that the said special privileges so as aforesaid stated in the agreement, were specially named and within the bills of lading, and said Noel relying upon such pretences and representations of the plaintiff, so falsely made, signed the same, without any explanation, whereby the plaintiff defrauded the defendant in procuring the said supposed bills of lading; that under the inducements aforesaid, the boat with all due diligence, according to her capacity and custom, well known to the plaintiff, proceeded on her voyage; that excessive severity of the weather, and the high winds then prevailing, hindered and delayed the boat, so that on arrival at Reed's Landing, near the foot of Lake Pepin, the farther prosecution of the trip became impracticable, and said Noel determined that he could proceed no farther, by reason of the extreme hazard of such late navigation, and the danger of ice and high winds in Lake Pepin, with an open flat boat, heavily laden, in tow, and that there being no means of forwarding the goods, they were stored until they could proceed, at the opening of navigation in the spring; and that in February, 1854, the plaintiff took possession of the pork, so stored, and forbade the defendant having any farther power or control over the same, and so discharged the defendant from any farther obligation under his contract. The owners then pleaded a set-off, claiming their freight money, *pro rata*. The freight agreed upon was one dollar and fifty cents per barrel. There was a reply. There was evidence tending to show that pork was worth from sixteen to eighteen dollars at Reed's Landing, and twenty dollars at St. Paul. There was also evidence, tending to show that the boat had a barge or a flat in tow,

on which her freight was conveyed, in part or wholly; that there was but one engineer and but one pilot, and he a *raft pilot* only, and who was not acquainted with the river above Lake Pepin; and that the boat could run by daylight only, for some reason pertaining to herself, and not to the weather or the river. There were thirteen instructions given to the jury by the court, in its charge in chief, and eight others were asked by the plaintiff. They are too voluminous to set out in full in this statement; but those to the giving or refusal of which exceptions are taken, will be shown in the opinion. The jury found a verdict for the defendant, upon which judgment was rendered, and from which the plaintiff appeals to this court, where he assigns for error, the admission of the testimony of the captain of the boat, and the giving, and refusal to give, certain instructions.

Wilise & Blachley, for the appellant.

W. T. Barker, for the appellee.

WOODWARD, J.—The first objection made in the case, which we will notice, is that made in the admission of the witness Noel. He was master of the boat, and was part owner at the time of giving the bills of lading. He was offered as a witness on the part of the defendant, and his competency was objected to, on account of interest. Being examined on his *voire dire*, he testified as follows: "I was captain and part owner, at the time when, &c. I have no interest in the present suit; I sold out before the present suit was instituted, and before it was thought of; nothing was said about any claim on the part of West, when I sold. It was not known then, that he intended any proceedings." It is not very manifest why this question is made in this court, for it is very slightly treated, and does not seem to be raised with much confidence. So far as the examination of the witness only can go, it clearly exonerates him from liability, *unless* that liability is involved in the very sale itself, under the idea of an implied warranty against incumbrance of liability to past

claims. No argument or authority is offered on this question. It will not be pretended, that we should adjudge this question in such a destitution of facts relative to the sale. There is no *evidence* concerning it, except the above testimony of J. F. Noel, the master, who says: "Nothing was said about any claim on the part of West, when I sold." We cannot *guess* at the terms of the sale. If the plaintiff wished to make this question, he should have had evidence of the contract of sale. And further, the papers do not show who appeared as owners of the boat, (which they should), but the testimony is all before the court, under a motion for a new trial; and in looking at this, we find that J. F. Noel, the master, is brother of J. B. and Anthony Noel, who signed the bond for the release of the boat. Now, if we should assume that these are the owners, and who had been joint owners with J. B. Noel, and that he sold *to them*, it might raise the question whether selling to his former co-owners, he would be liable. It is apparent that we cannot settle the question in the absence of the proper facts, and that the plaintiff must rest upon his examination upon the *voire dire*, as unsatisfactory as it is. In this, therefore, there was no error.

The first error assigned, is the admission of the above witness. The second and third are based upon the giving the instructions numbered 11 and 12, which are here given in substance. The 11th is, that, "if you believe that the plaintiff, to induce the captain to undertake the trip, agreed with him, that if at any point in the trip, the further navigation of the river should be found impracticable, by reason of the cold or stormy weather, or the captain should judge it unsafe and hazardous to proceed further, then defendant might store the goods; and that Noel, relying upon this contract, undertook the trip and signed the bills, and proceeded until it became impracticable to proceed farther, then your verdict should be for the defendant." The twelfth is, "although it is a general principle, that a written contract cannot be varied by parol evidence of instructions given before or at the time the contract is executed, because all the

terms of the agreement are supposed to be expressed and fixed by the instrument, yet you may take into consideration the instruction of the plaintiff to the captain, to store the goods at 'Reed's Landing,' in the event he should be unable to go farther; for this is not a variation or contradiction of the written contract. I say that so far as it would go to show that the defendant was entitled to store the goods, if it was impossible for the boat to proceed farther, because of the dangers of the river, and the closing of navigation, it would not be a variation, but on the contrary, as rather supporting it; for the bill of lading excepts the unavoidable dangers of the river, and reserves the 'usual privileges,' which is admitted to be the privilege of storing, when by reason of unavoidable danger from ice, the farther prosecution of the voyage is impracticable."

The only testimony upon which the twelfth instruction is based, is that by the master, as follows: "We (plaintiff and himself) both thought it might very likely happen that the Berlin would not be able to reach St. Paul. West said, 'If you can't get through, you can get part through.' When the boat started, West ran to the river bank, and said, 'If you can't get through, try and get to Charley Reed's, and deliver the goods there. He is the best man.'" If the charge of the court contained no more than is involved in the contract itself, we should not be inclined to reverse the judgment, because the court placed it upon the additional testimony; although it would be inadmissible, if it were independent matter. Now what is the law of the contract, in regard to the matter of these instructions? All contracts are to be viewed and construed with a reference to the nature and subject matter, and to the contingencies to which they are naturally subject. So with that before us. Such as this, are subject to the interruption of navigation. This enters into the contract, or it may properly enough be called the act of the Higher Power. Thus, a boat, taking freight in November, to carry from Dubuque to St. Paul, is bound to transport it to that place; but it is not *necessarily* bound to carry it there, during the *same season*. If the navigation becomes

impracticable in consequence of the cold, the storms, or the ice of the season, the boat is excused from *then* fulfilling the contract, either on the ground of the act of the Higher Power, or because of the nature of the contract, and the contingencies which may well come within the contemplation and foresight of the parties, or his view of the clause excepting the unavoidable dangers of the river. This latter, the clause in the contract, probably has primary reference to the safety of the goods, but may it not extend also to the *performance* of the contract?

But in the present case, it is immaterial which of these views we adopt. Under one or the other, the boat had a right to stop and turn about, *if the voyage became impracticable.* What, then, was it the duty of the master to do with the goods? should he store them, or should he bring them back to Dubuque? This question is not made in the case. The action is not brought upon this point. It is not because he should have delivered them back at Dubuque, rather than store them at "Reed's," but it is because they were *not* delivered at St. Paul. Too much is made in the charge, of this matter of storing at Reed's. It is made a *point* in this twelfth instruction. If the voyage was *impracticable*, then the master had a right either to store or to bring back; and there is no complaint made, that he did not return the goods to Dubuque. If what was said were to be viewed as varying the contract at all, or as changing the liability of the boat, we should consider it inadmissible. But we view it in the light of only directing *with whom* to store, if he was obliged to stop. We regard the instruction as containing nothing in substance but what pertains to the contract itself, that is, to the bill of lading. But the instruction lays too much stress upon the testimony, *as if* it were adding new matter. Yet we do not think this sufficient cause for a reversal.

The action is instituted, and damages are sought for *not carrying the goods to St. Paul*, and the only substantial question is, whether any sufficient reason is shown for not performing the contract? The instruction numbered fourteen, bears upon this question. It is this, "If at the time the goods

were shipped, the plaintiff knew the character and capacity of the Berlin, and that it was necessary for her, in order to carry this freight, to tow it in flat boats, and that she could run only in daylight, it would be your duty to consider that the contract was entered into by both parties in reference to these things; and the plaintiff can only demand that the boat should make such speed as such a boat could reasonably make, and encounter only such obstacles and risks as she could encounter with safety. The question is not, what could a better and larger boat have done, but what could this boat have done, with due diligence? and this will refer not only to the time when the goods were stored, but to any subsequent time during the season. In the opinion of this court, the question is rather, *what did the master undertake?* The above direction, *as a rule*, would not operate safely. It is for the master to know whether he has a competent boat, and one competently equipped. Over these things, the shipper has no control. A common carrier by land, may have a sorry team, or a poor railway, or an insufficient engine, and the shipper may know it; but he is not chargeable with that knowledge, so as to lessen the duty of the carrier. The master of the boat made his contract, as any other boat does; he charges according to the season and the state of navigation. When he contracts to transport goods from St. Louis to Dubuque, the shipper knows that he has two rapids to pass over; but the master charges a price accordingly, and would not be freed from responsibility on account of the shipper's knowledge, but inserts a clause in his contract to cover the danger. In this case, he says, West offered a large price, and he appears to have contracted for a large price. We think this instruction should not have been given.

The plaintiff requested the court to charge the jury: *First.* That it was the duty of the defendant to have a boat staunch, strong, and fit for the business of transporting freight from Dubuque to St. Paul, at the season of the year when the contract was entered into. *Second.* That it was the duty of defendant to have officers, engineers, and crew, sufficient in number and competency, to run the boat constantly day and

night. These instructions should have been given. Being given, they would not mean that he must have such a boat and equipment, as could run in spite of *all* obstacles, but as much, and at such times, as boats usually do, and subject to the same contingencies of navigation.

In the foregoing remarks, it is not intended to imply, that all boats are to be tested by one inflexible criterion as to capacity. They are to be tried by their *contract*, and it is intended that when a boat makes a contract in the usual terms of other boats, it cannot excuse itself from performance, by showing that it is a poor boat or badly equipped. The question in this case is, whether this boat was justified in abandoning the trip, and in not sending the goods on? And under this, whether she was fairly capable; whether she was properly equipped in officers, men, and materials; whether she waited at Reed's Landing as long as she should, to make the attempt; whether she could not get the goods through without the flats, or could not have forwarded them, &c.?

The plaintiff requested the court to give the following instructions: "The good order in which the defendant admits, by the bill of lading, the goods were received, refers only to the external condition, and not to the state of the pork itself in reference to its soundness." This was refused. A similar question might be answered differently, when applied to different kind of goods, or when applied to goods requiring different modes of packing, or admitting of different conditions in transportation. But the master cannot be held for the quality or soundness, (when shipped), of goods, packed like this *pork in the barrel*. He is not an inspector. This instruction should have been given. There was no exception taken to the fifteenth instruction. The judgment of the court is reversed, and it is directed to proceed in accordance with this opinion.

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HARRISON v. KRAMER et al.

Applications to set aside a default, are addressed to the grace and favor of the court, and are not granted as a matter of course.

Each case must be determined, to a great extent, upon its own circumstances, and no precise rule can be given, which shall govern the interference of the chancellor, to relieve a party from the consequences of his default.

Relief should never be granted, however, where the default is the consequence of the party's own negligence.

Where in a proceeding in chancery, to declare certain deeds of real estate, fraudulent and void, the respondents by agreement, were required by rule, to answer within sixty days, and a copy of the answers were to be served on the complainant's solicitors at Davenport, Iowa; and where, on the first day of the next term of the District Court, after the time fixed for answering, the complainant moved, no answers having been filed, for a decree *pro confesso;* and where, after the motion was made, but on the same day, two of the respondents filed their answers, which on motion of the complainant, were stricken from the files, and the default of the respondents entered in accordance with the motion of the complainant; and where on the fifth day of the term, the respondents moved to set aside the default, based upon affidavits, from which it appeared, that the attorneys upon whom respondents relied to prepare their answer, resided in Dubuque, a distance of some sixty miles; that said attorneys were unacquainted with the post-office address of the respondents, and could not prepare their answers without a conference with them; that some forty or fifty days after the adjournment of the term of court at which the rule was entered, the attorneys at Dubuque, wrote to the attorney resident in Jones county, for information as to the residence of the respondents, requesting him to have them go to Dubuque; that the attorney in Jones, was also unacquainted with their post-office address, though he knew where they resided, which was some eight or twelve miles from the residence of the attorney; and that he was so engaged, that he could not get them word, nor see them, until some time in July, subsequent to the receipt of the letter from the attorneys in Dubuque, which motion was overruled; *Held,* 1. That the respondents had not shown a reasonable excuse for having made default; 2. That the court did not err in striking the answers from the files, and in refusing to set aside the default.

Where a bill in chancery is taken as confessed, all distinct and positive allegations are to be taken as true, without proof; but if the allegations are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree, must be afforded by proofs.

In order to sustain any conveyance, as against either existing or subsequent creditors, it is essential that it be made upon a meritorious or valuable consideration, and *bona fide.*

While every material fact essential to his recovery, should be stated by a com-

plainant, in his bill, it is not necessary to state therein minutely, all the circumstances which may conduce to prove the general charge.

A court will pay attention, and give credit to its own records and proceedings, without further testimony to establish them, than the production of the proceeding itself; and especially is this true, where such proceedings have taken place in the same cause, or in another cause between the same parties, or those under whom they claim.

Where a complainant in his bill, refers to such records and proceedings, and asks that they may be taken as a part thereof, they stand as exhibits, to which he can refer, and upon which he may rely, upon the final hearing, without proof of their genuineness, unless they shall be in some manner denied or impeached.

Where it appears from a decree *pro confesso*, that the court below was satisfied that all things necessary to entitle the complainant to the relief sought, were proved, the appellate court will not presume that there was a want of evidence to make those things certain and definite, which might by the bill unaided by proof, appear uncertain and indefinite.

Where a decree recites that certain matters essential to its rendition, were made to appear, the appellate court will presume, that they were made to appear in the proper manner, and that the court rendering such decree performed its duty.

Where a bill in chancery to set aside, and declare fraudulent and void, certain deeds to real estate, against a father and his son, and a third person, to whom the son conveyed, alleged that at the time the land was entered by the father in his own name, he was a debtor of the complainant; that before a judgment was rendered on the debt, in favor of the complainant, the father without any good or valuable consideration, conveyed the land to the son; that at the time of the rendition of the judgment, and for a long time before, the father lived on the land, cultivated it as a farm, paid the taxes, and used and sold the crops raised thereon; that the deed from the son to the third person, was without any consideration, and was fraudulent and void against complainant; that the father remained in possession, long after the deed to the third person was executed; and that such third person had admitted that he held the title thereto, for the benefit of the father; and where the bill referred to the records and proceedings in the cause in which the judgment against the father was rendered, and made them a part thereof; and where the decree *pro confesso* recited that it was made to appear, that the judgment was rendered as charged: that an execution issued, was levied, the land sold, and the sheriff's deed made, at the time and under the circumstances set forth in the bill; that the father had fraudulently conveyed the land to the son, and the son to the third person; that as against the complainant, said deeds were fraudulent and void; and that the land was held by the third person in fraud of the rights of complainant; *Held*, 1. That the bill averred with sufficient distinctness, that the complainant was a creditor of the father, at the time of the conveyance to the son; 2. That the bill did show, that at the time of the conveyance to the son, the father was largely indebted; 3. That it sufficiently appeared from the bill, that the convey-

ances were made in bad faith; 4. That the bill authorized the decree rendered.

Where the purchaser of the equitable interest of the execution defendant in real estate, files his bill in chancery, to perfect his title, or to set aside a conveyance of the property by the debtor to third persons, which he alleges to be fraudulent, it is not necessary to aver and prove, that an execution had been returned *nulla bona*, prior to the levy upon and sale of the equitable interest of the execution defendant, purchased by the complainant.

Section 1947 of the Code, however much it may operate to protect a *bona fide* purchaser, without notice, who may take title after the twenty days therein named, cannot protect one who purchases with *actual* notice, or one who purchases with a fraudulent intention to defeat the title of the person who purchased under the execution.

Appeal from the Jones District Court.

BILL in chancery to set aside and have declared fraudulent two deeds of certain real estate. As shown by the bill, the complainant in September, 1851, obtained a judgment in the Jones District Court, against the respondent, Adam Kramer, for some fourteen hundred and sixty dollars. On this judgment an execution issued, and by virtue of it, the interest of the said Kramer, in the land in controversy, was sold to complainant for the amount of said judgment, interest and costs, on the fourteenth of February, 1852, and on the 10th of November, 1854, he procured a sheriff's deed therefor. Prior to this judgment, Kramer conveyed said land to his son John, who afterwards, on the 6th of May, 1854, conveyed the same to John Graham. The two Kramers and Graham are made parties defendant. The bill charges said conveyances to be fraudulent and void, and the prayer is, that they may be so declared as against complainant, and that his title to said lands may be made perfect, by having the said Graham convey to him.

This bill was filed prior to the April term, 1856, and at that term, the defendants appeared, and by agreement, a rule was entered that they answer within sixty days, a copy of the same to be served on complainant's attorneys at Davenport, Iowa. On the first day of the September term, 1856, no answer having been filed, complainant moved for a decree *pro confesso*. After this, but on the same day, John

Kramer and Graham, filed their answers. Complainant moved to strike said answers from the files, because they were not filed in time, were filed without the leave of the court, and because no copies were furnished complainant's solicitors. This motion was sustained, and the default of respondents entered, in accordance with complainant's motion. Afterwards, on the 5th day of that term, respondents filed affidavits, accompanied by the said answers, to set aside said default, which application was overruled, and a decree *pro confesso* was then entered. The material parts of the decree, as well as the other allegations of the bill, will be found sufficiently referred to in the opinion. Respondent appeals.

Smith, *McKinlay & Poor*, and *W. J. Henry*, for the appellants.

The deed from John Kramer to John Graham, was dated 6th May, 1854, and filed for record 8th of May, 1854; more than one year after the sheriff's sale, and was more than six months before the making of the sheriff's deed. It will be observed that there is no pretence in the bill, that Adam Kramer was indebted to the plaintiff at the time he made the deed to his son. This is absolutely necessary, even though the conveyance was voluntary and without consideration. See Willard's Equity, 232, 233, 235, and authorities there cited.

It is not alleged, and not proved, for there is an entire absence of both allegation and proof, that an execution was ever issued and returned *nulla bona* against Adam Kramer. This should have been done before any relief could be had, and before the court would undertake to inquire into the consideration and validity of deeds made to his son. See *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 675; *Star* v. *Rathbone*, 1 Barb. 70; *Manchester* v. *McKee*, 4 Gilm. 511.

It is not pretended by any charges in the bill, that there was any intent to defraud on the part of Adam Kramer, of John Kramer, or of John Graham. It is only alleged that the deeds are without consideration, fraudulent and void as to creditors. The allegation that the deeds are void and

fraudulent, is only alleged as a consequence resulting from the want of consideration. This is a consequence which by no means necessarily follows. If Adam Kramer was not in debt at the time the deed was made, or if he was only in debt to a small amount, then he had a perfect right to make the deeds. It should be positively alleged in the bill, and proved in some way, that the indebtedness sued on existed at the time that Adam Kramer conveyed to his son. Without this allegation, the court cannot infer that the deed was fraudulent.

The bill in this case was taken *pro confesso*; but to entitle the plaintiff to relief, it should appear from the bill, that a case was made out. For instance, it should show that Adam Kramer was in debt at the time he made the deed to his son. It should show that an execution was sued out against Adam Kramer, and returned *nulla bona*. It should show that the transaction between Adam Kramer and John, and between John and Graham, were in bad faith. These facts should all be charged in the bill; and where the proof consists of documentary evidence, this evidence should be filed in the case. See 4 Hen. & Munf. 476, cited in note to page 578 of 1 Daniell's Chancery Pr. See other authorities there cited. *Peggs* v. *Davis*, 2 Blackf. 281.

The sheriff in this case, levies upon property which, according to the statement of the bill, was held in the name of John Kramer, at the time it was levied upon. The bill states that the property was bid off for sufficient to satisfy the judgment and costs. If this property had been in the name of Adam Kramer, during all this time, the sale would have extinguished the lien of the judgment, or rather it would have been extinguished after the time of redemption had run out, and twenty days thereafter. See Code, § 1947. Adam Kramer could have made a deed to Graham perfectly discharged from any lien created by the judgment, and disincumbered of the sheriff's sale after that time. If Adam Kramer could have done this, no good reason is perceived why John Kramer could not have done the same thing. The sheriff had no more right to sell the property of John Kra-

mer, than he had to sell that of any other individual, to satisfy this judgment. If he could find no property belonging to Adam Kramer, he should have returned the execution *nulla bona;* and then the plaintiff might have filed a creditor's bill, charging fraud—setting forth that Adam Kramer was in debt, at or before the conveyance to his son; the intent to defraud, the return of the execution, and charging that Graham had bought without consideration, with intent to defraud, &c. The case would have been *prima facie* made out on the face of the bill. As it is, no case is made out, even giving the most liberal construction and intendment to every averment contained in the bill; and there are several important averments in the bill which are not sustained by proof.

There is no charge in the bill to the effect that Adam Kramer was not a man of large property, at the time he made the conveyance to his son. It does not appear but that he may have been wealthy, and but that his indebtedness may have been small. It would be going quite far enough for the court to infer fraud from these facts, if plainly and distinctly charged and admitted. In fact the court will plainly see from the pages of Willard's Equity, above cited, that it by no means follows that a conveyance by a father to his son, is void, even though he is indebted at the time, and though he may be a man of limited means. It is generally conceded to be a question for the jury, even in such cases, and that the absolute presumption does not attach, except that the circumstances are extreme and strong. The entire absence of all charges as to the condition and circumstances of Adam Kramer, at the time of making this deed, leaves an absence of all equity in this bill. The court will not draw inferences of fraud from its own imagination, where there are no facts charged which will warrant it.

There is another view of this case which is worthy of consideration. This bill was taken *pro confesso*, after an answer had been put on file. The answer was ordered to be taken off from the files, which was filed before default entered. The answer goes to show that the deeds to John Kramer and

to Graham, were both for valuable consideration; that there was a meritorious defence. We say it was in time, if filed before the motion for default was decided. The court will not undertake to deprive a party of the right to defend, turn him out of his real estate, without even an opportunity of examining the deeds and title papers under which he holds. If the plaintiff seeks such a remedy, to be obtained in such a manner, he should have at least, obtained copies from the records of the county, that the court might have some documentary evidence, something more than mere loose allegations in the bill as to the real facts and circumstances of the case. This decree was a perfect strike in the dark. The decree was entered irregularly, without the previous steps necessary thereto, having been taken. 1 Daniell's Chancery Practice, 578, note, and the authorities there cited; same book, page 570, *et seq.*

Whitaker & Grant, for the appellee.

The error assigned is the refusal of the court to set aside the default and allow an answer to be filed. This was a matter of discretion with the court, and is no ground whatever for error. *Cook* v. *Miller*, 11 Illinois, 613; *Brink* v. *Morton*, 2 Iowa, 411. No appeal lies for the refusal of the court to open a former decree, because it is a matter resting in the sound discretion of the court below. *Brockett* v. *Brockett*, 2 Howard, 240. Where the defendant neglected to answer a bill in chancery, agreeably to the rules of the court, and the bill was, on that account taken as confessed, and a decree made thereon, it was held, that the cause was not appealable, though the defendant had not neglected to appear. *Hart* v. *Strong*, 15 Vermont, 377. After an answer has been filed, and replied to, and the cause set down for hearing, the defendant failed to appear at the hearing, and a decree was rendered against him by default, held, that such a decree was not the subject of appeal. *Sands* v. *Hildreth*, 12 Johns. 493. A decree by default, cannot be the subject of appeal. *Kane* v. *Whaluck*, 8 Wendell, 219; *Ringold's Case*, 1 Bland, 5, 12. The case in Bland, is a long history of

appeals and writs of error, and cites many of the old cases both at law and equity. A refusal of the chancellor to vacate an order taking the bill as confessed, cannot be the subject of appeal. *Rowly* v. *Van Berthayn*, 18 Wendell, 319. "No appeal from a decree *pro confesso*." *Murphy* v. *A. M. S. Co.*, 25 Wendell, 249.

But if this was a cause in which an appeal would lie, there is no cause for error. There was no good reason, no just cause assigned, why the answer was not filed. It was not filed from gross carelessness—a total neglect of the business by both attorney and client.

It does not appear from the bill, when the claim accrued on which the judgment was rendered. Reference is made by this petition, to all the proceedings in the original cause on file in said Jones District Court, which the appellant neglects to bring here. And against his neglect, everything is presumed to be rightly done. Where a party refers to the proceedings of the same court, he never attaches copies to his bill, because the court takes notice of its own proceedings. Courts will take notice of what ought to be generally known within the limits of their jurisdiction. 1 Greenleaf, § 6, last clause. The record itself is only produced, when the cause is not in the same court where the record of it is. 1 Greenleaf, § 502. Where a domestic record is put in issue by the plea, the question is tried by the court, though it is a question of fact. The reason is, that the judges can themselves have an inspection of the very record. 1 Greenleaf, § 502, note 3. We have never known a court to be furnished in pleading, with a copy of its own record.

The citation from the Code, (§ 1947,) is just the reverse of its meaning. The allegation, that there is no pretence in the bill, that Adam Kramer was indebted to the plaintiff at the time he made the deed to his son, is not true. The original bill and proceedings which the appellant wants to bring here, show the indebtedness to have accrued years before the deed from Adam to John Kramer.

We have not Willard's Equity, but it nowhere lays down any such doctrine, as that referred to, if it were applicable

to this case. A voluntary gift to a son, where a father is not in debt, is binding in favor of the son, as against subsequent creditors, but a voluntary conveyance, *with intent to defraud any creditors*, is void as to both prior and subsequent creditors. It is not alleged, says the brief, and not proved. What has a defendant by default, to do with the proof? If he had brought up the proof, which is on the files below, the court could determine the fact as well as the counsel, that an execution was issued, and returned *nulla bona*, &c. This is altogether outside of this cause. If the defendants wanted to show that any fact was wanting, necessary to give the court jurisdiction, he should have answered and shown it. In the absence of even a trial, this court would presume in favor of the jurisdiction of the court below, where there is an appearance. A default admits the plaintiff's cause of action, even at law. This is a decree by confession. A default in equity is, where the defendant never appears, or after appearance, he has neglected to answer; it is a decree *pro confesso*. Adams' Equity, 874, margin. The argument of the appellant proceeds on the assumption, that this is simply a creditor's bill filed before execution, whereas, it is a bill by a purchaser under a judgment, to cancel a fraudulent conveyance. It is not a bill to subject property to execution, which could not be reached by execution, but it is a bill to protect a purchaser under a judgment against the effect of a fraudulent conveyance, which is recorded, and a cloud on his title. There is, however, no such rule as that laid down by the counsel, nor do the authorities to which he refers us, say so..

In *Brinkerhoff* v. *Brown*, 4 Johns. C. 675, the rule is laid down, that "the creditor must show a *judgment* at law, which creates a lien on the estate, for which he seeks relief." In *Star* v. *Rathbone*, 1 Barbour, 70, the bill was for an injunction, in relation to personal property, which the court refused, because he might sell it. The case of *Manchester* v. *McKee*, 4 Gilman, 511, was evidently cited without being read, for in the marginal note are these fatal words, to the plaintiff's case: "A party against whom a bill has been taken for confessed, cannot assign for error, that the proofs

do not sustain the bill." The court in that case, decided that there was no such thing as an equitable attachment, and that a judgment by attachment does not give jurisdiction in *personam*, so as to make such a judgment evidence of debt generally. The court, in *Manchester* v. *McKee*, refers to *Beck* v. *Burdett*, 1 Paige, 305, which the counsel against us, could not have examined. "There are," (says the chancellor,) "two classes of cases, where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law, without obtaining satisfaction of his debt. In one case, the issuing of the execution, gives the plaintiff a lien on the property, but he is compelled to come here for the purpose of removing some obstructions fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law." In the first case, the plaintiff may come into this court for relief, immediately after he has obtained a lien on the property by the issuing of an execution, &c. *Beck* v. *Burdett*, 1 Paige, 308. The general principle is, that where a creditor seeks the aid of a court of equity, to subject property fraudulently conveyed away, a *judgment* must be first obtained, before any land so conveyed can be reached, and in pursuit of personal property, a *fi. fa.* must first have been issued. *Breveley* v. *Stuley*, 5 Gill & Johnson, 432. The counsel on the other side, have confounded creditors' bills against personal property, with those against real estate. We should multiply cases on this point, but the appellants' own authorities do not go any farther, and having fully investigated the question before this court, some years ago, we know that we are right.

Now we suppose, we need not produce a great deal of authority to show, that a court of equity protects a purchaser against fraudulent conveyances. See 1 Story's Equity Jurisprudence, as to fraudulent conveyances, and the rights of subsequent purchasers, after such fraudulent conveyance, (§§ 425, 426,) and the same authority, as to the cancelation of fraudulent instruments, section 700.

By the laws of our state, the equitable and trust interest of parties may be sold on execution. The judgment is a lien on them. It is the first time we have learned a doubt expressed in our state, that a creditor could not levy on the property of his debtor, fraudulently conveyed, sell it, and that the purchaser could not file his bill to cancel the fraudulent conveyance as a cloud on his title. See 1 Stockton, 160.

Reference is made to 4 Henry & Munford, 476. This is a report of a trial in the court below, a chancery court, not an appeal. The court say: "That on a bill as confessed, the plaintiff cannot take a final decree without filing his documents." In this court, on appeal, the court presumes it was done.

The appellants cite, *Brown* v. *Hollenbeck*, 2 Greene, 319. Why? That was a case where an answer was regularly filed, and was on the file according to the rules of the court, and the plaintiff took judgment by default, without noticing the answer. The cases from 2 Paige, 332, and 3 Paige, 408, are directly in conflict with the principle which the appellant seeks to establish. But our authorities already cited, are too numerous and too conclusive, to allow this court to go behind the default. These cases conclusively establish, that no appeal lies, no errors can be shown, where the defendant below suffers a default. If the court had jurisdiction of the cause, and the parties, there is an end of the cause. Reasons for setting aside the default, could be addressed alone to the court below. If ever there was a case in which the defendants allowed a default from pure carelessness, this is one of them.

Since writing this brief, we have, in looking up another question before the court, examined *Smith* v. *Espy*, 1 Stockton, (N. J.,) 160, which was a bill precisely similar to this. That was a bill by a purchaser, under a judgment, against a debtor and his assigns, to set aside a fraudulent conveyance, where the property for which the bill was brought, was sold on execution. The whole case is worthy of perusal by the court. The fraudulent conveyance was made in 1846. The

judgment was rendered in 1849, for all that appears, on a subsequent debt. The court say: "A deed fraudulent as to judgment creditors, may be impeached by a purchaser holding a conveyance under that judgment, but such purchaser stands in no better situation than the judgment creditor, filing a bill to avoid the alleged fraudulent deed."

WRIGHT, C. J.—To reverse this decree, appellants rely upon two grounds. The first is, that the court below erred in striking their answers from the files, and refusing to set aside the default. In the second place, it is urged, that complainant's bill, though unanswered, did not authorize or justify the decree rendered.

To sustain the first position, we are referred to section 1827 of the Code, which provides that a default may be set aside on such terms as the court may deem just, but not unless an affidavit of merits be filed, and a reasonable excuse be shown for having made such default. In this case, the only question to be considered is, whether a reasonable excuse is shown for having made default, for in other respects the affidavits fully comply with the requirements of the law. Complainant insists that this court cannot review the action of the District Court, in granting or refusing an application of this character. Without determining this question, it is sufficient to say that we see no sufficient reason for interfering with the discretion exercised in the case before us. Such applications are addressed to the grace and favor of the court, and are not granted as a matter of course. Each case must be determined to a great extent, upon its own circumstances, and no precise rule can be given, which shall govern the interference of the chancellor to relieve a party from the consequences of his default. The relief, however, should never be granted when the default is the consequence of the party's own negligence. *Wooster* v. *Woodhull*, 1 Johns. Ch. 538; *Parker* v. *Grant*, Ib. 630; *Rucker* v. *Howard*, 2 Bibb, 166. And in view of these principles, we repeat, that we cannot say that respondents made a sufficient showing to entitle them to have the default set aside. According to the rule,

they were to answer within sixty days. They did not answer till long after that time, and then not until complainant had filed his motion for judgment for want of an answer. From this showing, it appears that their attorneys, or those upon whom they relied for drawing their answers, resided in Dubuque, a distance of some sixty miles; that said attorneys were unacquainted with the post-office address of respondents, and could not prepare their answers without a conference with them. Some forty or fifty days after the adjournment of the term, at which the rule to answer was entered, their attorneys wrote to the resident attorney for information as to the residence of said respondents, requesting him to have them go to Dubuque, but he also was unacquainted with their post-office address, though he knew where they resided, which he says was some eight or twelve miles from his residence, and that he was so engaged that he could not get them word, nor see them until some time in July subsequent to the receipt of the letter. In addition to these averments, there are some general statements that affiants believe that due diligence has been used. By such general averments we cannot be governed, but must look alone to what has been done. Now, these attorneys were present and consented to the entry of the rule to answer. The parties were also there; one of the attorneys resided all the time in the same county. It was understood that attorneys residing sixty miles distant, were to draw the answers, and this they could not do, without the presence of their client. They separate, however, neither attorney knowing the post-office address of his client. After this, the respondents are entirely inactive, and do nothing towards filing their answers as required. Some ten or twenty days before the expiration of the time, a letter is written, inquiring for respondents, and the attorney to whom it is addressed, not knowing their address, fails to inform them that they must go to Dubuque. He knew where they resided, however, and yet with the knowledge that the time for answering had nearly expired, he takes no efficient steps to advise them that they were required at Dubuque. He does see them, however, in July,

some thirty days after the answers should have been filed, and still there is delay until September, when court convened. And even then their answers are not filed until complainant moves for a default. If such a showing can be regarded as a *reasonable excuse* for having made default, within the meaning of the Code, then we must acknowledge that we do not know what excuse would not be sufficient. There appears to us to have been a want of proper attention to what was required of them, on the part of both counsel and clients. To hold the respondents answerable for the consequences resulting from such want of attention, may operate hardly in this particular case, but it is better so, than to allow a hard case to make either a bad law, or a bad precedent. In *Brown* v. *Hollenbeck*, 2 G. Greene, 318, referred to by appellants, the defendant's answer was filed within the time required by the rules of the court, and on the day previous to that on which judgment by default was entered. The distinction between that case and the one before us, is too apparent to require further comment.

Again; the fact that the answers were filed before the motion for judgment by default was decided, could not of itself deprive the complainant of his right to such judgment. At any time after the expiration of the sixty days, complainant was entitled, in the absence of any sufficient excuse for respondent's failure to answer, to a default, and after he had by motion claimed this right, it was the respondent's duty to satisfy the court of the sufficiency and reasonableness of his excuse. A court might be satisfied with a less showing where the answer is exhibited before the entry of the decree, than where it comes in after; but there must be in either case, a reasonable excuse for the default, and the filing of the answer alone is not sufficient. Such a reasonable excuse, does not appear in this case.

We then come to the consideration of the second consideration made by appellants, and under this head several objections are made, which we will proceed to notice in the order presented.

Before doing so, however, it is well to settle and consider

some general rules which may guide us in determining the questions raised.

Where a bill is taken as confessed, we understand that all distinct and positive allegations are to be taken as true, without proof, but if the allegations are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proof. *William* v. *Corwin*, Hopk. 471; *Marshall* v. *Tenant*, 2 J. J. Marsh. 155; *Pegg* v. *Davis*, 2 Blackf. 281; *Platt* v. *Judson*, 3 Ib. 235; *Fellows* v. *Shelmure*, 5 Ib. 48; *Landon* v. *Ready*, 1 Sim. & Stuart, 44; *Stroblet* v. *Lovejoy*, 8 B. Mon. 135.

In the next place, we remark, that we understand that it is essential, in order to sustain any conveyance as against either existing or subsequent creditors, that it shall be *bona fide*. In other words, whether a conveyance be fraudulent or not, must depend upon its being made upon a good consideration and *bona fide*. It is not sufficient that it be upon a good consideration or *bona fide*. It must be both, and by a good consideration as here used, we mean one that is either meritorious or valuable. It is true, that "there is nothing inequitable or unjust in a man's making a voluntary conveyance or a gift, either to a wife or child, or even to a stranger, if it is not at the time prejudicial to the rights of any other persons, or in furtherance of any meditated design of future fraud or injury to other persons.

If there is any design of fraud or collusion, or intent to deceive third persons, in such conveyances, although the party be not indebted, the conveyance will be held utterly void, as to subsequent, as well as present creditors; for it is not *bona fide*." Story's Eq. Juris. §§ 353, 356.

Again, we understand, that while every material fact essential to his recovery should be stated by a complainant in his bill, yet it is not necessary to state therein minutely all the circumstances which may conduce to prove the general charge. "Thus, for example, if a bill is brought to set aside an award, bond or deed, for fraud, imposition, partiality or undue practice, it is not necessary in the bill to charge every particular circumstance; for that is a matter of evidence,

every part of which need not be charged." Story's Equity Pleadings §§ 28, 252; 1 Daniell's 412, note 1, and the authorities there cited. *De Louis* v. *Meek*, 2 G. Greene, 55.

A court will also pay attention and give credit to its own records and proceedings, without further testimony to establish them, than the production of the proceeding itself; and especially is this true, where such proceedings have taken place in the same cause or in another cause, between the same parties or those under whom they claim. Under our practice, the party wishing to use such records and proceedings, produces them on the hearing, without proof of their genuineness. And where by his bill, he refers to such records and proceedings, and prays that they may be taken as a part thereof, they stand as exhibits, to which he can refer, and upon which he may rely on the final hearing, without proof of their genuineness, unless they shall be in some manner denied or impeached.

And finally, where from a decree *pro confesso*, it appears that the court below was satisfied that all things necessary to entitle the complainant to the relief sought, were proved, this court will not presume that there was a want of evidence to make those things certain and definite, which might by the bill, unaided by proof, appear uncertain and indefinite. In some instances, it would be the duty of the court, before rendering such a decree, to refer the matter to a master, to take an account or testimony, or the court might on its motion, continue the cause for testimony, by depositions to be heard at a subsequent term. Where this is not done, however, and the cause is heard at the same term, and the decree recites that certain matters essential to its rendition were made to appear, the court will presume that they were made to appear in the proper manner, and that the court rendering such decree, performed its duty. *Grubb* v. *Crane*, 4 Scam. 153. Having thus briefly stated what we understand to be some of the principles applicable to the case before us, we proceed to consider the objections to complainant's bill, and the decree of the court below.

And these are, that the bill does not aver with sufficient

distinctness, that the complainant was a creditor of Adam Kramer, at the time of the conveyance to the son,—that it does not show that the father was at the time largely or otherwise indebted—that it nowhere appears that the transaction between the father and son, and the son and Graham, were in bad faith—and finally, that it does not show that an execution had been issued and returned *nulla bona*, before the levy upon and sale of this land.

It may be conceded, that the bill does not aver, in so many words, that complainant was a creditor of the father at the time of the conveyance to the son. It is averred, however, that the land was entered by the father in his own name, that at the time, complainant was a creditor; that after the conveyance, the father was sued, and judgment obtained in favor of complainant, but whether upon the debt existing at the time of the entry, is not distinctly stated. But it is averred, that after the entry, and before the judgment, without any good or valuable consideration as against his creditors, the father conveyed to the son; that at the time of the judgment, and for a long time before, he lived on said land, cultivated it as a farm, paid the taxes on the same, and used and sold the crops raised thereon. It is also averred, that the deed from the son to Graham, was without any consideration, and was fraudulent and void against petitioner; that the father remained in possession long after the deed was made to Graham, and that he, (Graham,) has admitted that he held the title thereto for the benefit of Adam Kramer. It is then distinctly averred, that the deeds from Adam to John, and from John to Graham, are void as against complainant; that they are fraudulent for want of consideration as against him, a creditor of the said Adam, when he made the entry, and are a cloud upon his title. By the bill also, the complainant refers to the records and proceedings of the cause in which judgment was rendered against Adam Kramer, as on file in that court, and makes them a part of his petition. In addition to all these things, the *decree* recites that it was made to appear to the court, that the judgment was made as charged; that an execution issued, was levied, the land sold, and the

sheriff's deed made at the times and under the circumstances set forth in the bill; that Adam Kramer had fraudulently conveyed said tract of land to John, and John to Graham; that as against the complainant, said deeds were fraudulent and void; and that said land was held by said Graham, in fraud of the right of said complainant.

Now, if the bill was subject to the charge of indefiniteness and uncertainty, we think the objection entirely fails when we look to the decree and bear in mind the presumption that arises from what is therein stated. But by the bill the charge of fraud is clearly and distinctly made, and it is as clearly stated, that the conveyances were made without any consideration to support them, and were, therefore, fraudulent and void as against complainant. Suppose these averments had been admitted by the answers of respondents, what difficulty would there have been in rendering a decree in accordance with the prayer of the bill. It appears to us, that there could have been none. And is there any more difficulty where the bill is taken for confessed for want of an answer, and especially when the decree recites that these matters were made to appear to the court. How they were made to appear, it is true, is not shown. It seems that the court heard the cause at the same term, without referring it to a master or continuing it for taking testimony. To this course, we can see no objection. And having thus heard it, we are bound to presume, in the absence of any showing to the contrary, that the testimony was sufficient, and that those things were *properly* shown and made to appear, which are recited in the decree. They may have been made manifest by the records and proceedings in the original cause, which are referred to and made a part of the bill, but which the appellant has not brought up with the record now before us. But whether in this method or some other, it is sufficient to say, that the decree does clearly show that the alleged conveyances were shown to be fraudulent and in fraud of complainant's rights. This reference to the bill and decree, disposes of all the objections stated, except the one that the bill does not aver, nor is there anything to show, that an execu-

tion had been returned *nulla bona*, prior to the levy upon and sale of this land. However the rule on this subject may be, in the case of the ordinary bill filed by the creditor to discover and make subject to the payment of his debt, the equitable assets of the debtor, is such averment and proof necessary where the execution has been satisfied in whole or in part by a sale of such equitable interest, when the purchaser comes into court to perfect his title or to set aside a conveyance of the property by the debtor to third persons, which he alleges to be fraudulent?

We think not. By our law, a judgment is a lien upon the real estate of the defendant, and by real estate is meant all right thereto, and interest therein, *equitable* as well as legal. Sections 2485, 26.

Any property of the defendant, except such as is exempt from execution; and by property is meant real, as well as personal property or estate. Sections 26, 1903, 1904. According to these provisions, the equitable interest of a defendant in land or real estate, is as much subject to execution and sale, as this legal interest or estate. The creditor has his election, in the first instance, to levy upon and sell either. He does not in fact, need the aid of a court of equity, to enable him to subject the equitable estate to his judgment. If he elects to proceed with his execution and sell the property, he purchases at his own risk, whatever interest the defendant may have in the property. When he seeks to draw to the equitable interest so purchased, the outstanding legal title, if he shall fail, he must ordinarily suffer the consequences. We do not say, that he may not after the judgment, file his bill and have the title settled, before selling. This we think he may do, but he is not bound to settle it in advance, but may sell under his execution, become the purchaser, and if there is no redemption, then file his bill and quiet his title. And in such a case, it is not necessary to have a return of *nulla bona*, before levying upon and selling the equitable interest.

Nor do we say, that when he has thus levied, the person holding the legal or adverse title, may not file his bill and

enjoin the creditor from interfering with his property until the title is settled. We have no doubt but that this may be done.

Nor when it is said that a judgment is a lien upon the equitable as well as the legal interest of a defendant, do we wish to be understood as holding that such lien would affect the legal title of one who held the land *bona fide*, without notice of such equity.

But when, as in this case, the person holding the legal title, is charged and proved to have obtained it in bad faith, with full notice of the rights of creditors, we think the lien continues; and that the creditor may sell such property, and file his bill, after his purchase and the expiration of the time for redemption, without showing a return of *nulla bona* prior to his levy. *Frakes* v. *Brown*, 2 Blackf. 295.

Again, and finally, it is claimed, that the Code gives to the purchaser of real estate on execution, only twenty days after the expiration of the full time for redemption, to place his deed upon record; and that the sale in this case being made in February, 1852, and the deed not being recorded until November, 1854, Graham's rights could not be affected by such deed.

The section of the Code relied on, is as follows: "The purchaser of real estate on a sale on execution, need not place any evidence of his purchase upon record until twenty days after the expiration of the full time of redemption. Up to that time, the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer." Section 1947. However much this section might operate to protect a *bona fide* purchaser without notice, who might take title after the twenty days therein named, it certainly cannot protect one who purchased with *actual* notice of the rights of the purchaser under the execution, or one who purchases with a fraudulent intention to defeat such execution purchaser's title. In this case, as already shown, the averments are abundant that Graham was a fraudulent purchaser; and it is clearly stated that he has admitted since his purchase, that

he held the title for the benefit of Adam Kramer. If these things be true, then the failure of complainant to have his deed recorded within the time limited, cannot enure to the benefit of Graham.

CLARK *v.* LANGWORTHY.

Where in a suit in chancery to enforce the specific performance of an agreement as follows: "The state of Iowa, July, 1853. Be it remembered that Lucius H. Langworthy, of the city of Dubuque, and Lincoln Clark, of the same place, do hereby covenant and agree with each other, as follows, to wit: The said Langworthy sells to said Clark, the south half of his lot on the bluff at the head of Main street in said city, and bounded on the east, by lot No. 677, and on the west by lot No. 678; for which the said Clark is to pay the said Langworthy the sum of one thousand dollars, when an act of Congress shall be passed, confirming the title to said lot, either in the said Langworthy, or in the corporate authority of said city, of whom the said Longworthy purchased; *provided*, the said act shall be passed during the session of Congress next ensuing. Upon the payment of the aforesaid sum of money, the said Langworthy is to make to the said Clark, a good fee simple title to the piece of land hereby intended to be conveyed, free from all incumbrances, and with the usual covenants of warranty. And the said Langworthy and Clark, mutually agree, each with the other, to make a public street through the middle of said lot, from east to west; the said Langworthy giving thirty feet off the south side of the north half of said lot; and the said Clark giving thirty feet off the north side of the south half thereof. Each party hereby promises to the other faithfully to perform;" the bill alleged, that the parties first made a verbal contract, according to which respondent was to make a warranty deed; that respondent purchased the lot from the city of Dubuque, and took such title as it had, without warranty; that a few days after making the verbal contract, the respondent came to the complainant, for the purpose of giving the deed, and receiving his money; that he brought with him his deed from the city, and then for the first time, *seemed* to have discovered that it was not a warranty deed; that he desired the complainant to accept a similar one to that which he had, which the complainant was unwilling to do, and as a consequence, the agreement was modified, and the written agreement substituted for the oral one; that the parties were to exert themselves to procure the passage of an act of Congress, respecting the title; that complainant did so exert himself, but that the respondent interposed to prevent the passage of said act at and during the session of Congress aforesaid; that real estate in said city, including the premises in controversy, had, since the making of the contract greatly appreciated in value; and that for this rea-

son, the respondent had refused to convey, and had before the expiration of the session of Congress alluded to, laid off the premises into smaller lots, and was offering them for sale; and where the answer of the respondent, admitted the making of the written contract, the tender of the purchase money, the demand for a deed, and the laying of the premises into lots; but denied the previous verbal contract, and also any interposition to prevent the passage of the act of Congress, and averred that the only agreement ever entered into was that above recited, which was to be void, if the said act of Congress should not pass at the then next session of Congress, and that the failure of Congress to pass said act, released him from any liability to convey the premises; and where it appeared that the session of Congress next ensuing the making of the agreement, terminated in September, 1854, but no act was passed confirming the title to the premises, either in the city of Dubuque or the respondent; and where the charge of interposition by the respondent, to prevent the passage of the act by Congress, was supported by a single witness; *Held*, 1. That the proviso in the contract, referred to the contract of sale, and made the agreement mean, that if the act of Congress did not pass at the session next ensuing after the execution of the same, the contract was to be at an end. 2. That the contract could not be enforced against the complainant, and that he could not enforce it against the respondent. 3. That there being but a single witness against the denial of the answer, the charge that the respondent interfered to prevent the passage of the act by Congress, was not sustained.

The denials in an answer in chancery responsive to the bill, cannot be overcome by the testimony of a single witness.

Appeal from the Dubuque District Court.

THIS is a suit in chancery, brought by complainant, to enforce a specific performance of the following agreement: "The state of Iowa, July, 1853. Be it remembered, that Lucius H. Langworthy, of the city of Dubuque, and Lincoln Clark of the same place, do hereby covenant and agree with each other as follows, to wit: The said Langworthy sells to said Clark, the south half of his lot on the bluff at the head of Main street, in said city, and bounded on the east by lot No. 677, and on the west by lot No. 678, for which the said Clark is to pay to the said Langworthy, the sum of one thousand dollars, when an act of Congress shall be passed confirming the title to said lot, either in the said Langworthy or in the corporate authority of the said city, of whom the said Langworthy purchased; *provided* the said act shall be passed during the session of Congress next ensuing. Upon the pay-

ment of the aforesaid sum of money, the said Langworthy, is to make to the said Clark, a good fee simple title to the piece of land hereby intended to be conveyed, free from all incumbrances, and with the usual covenants of warranty; and the said Langworthy and Clark, mutually agree, each with the other, to make a public street through the middle of said lot from east to west, the said Langworthy giving thirty feet off the south side of the north half of said lot, and the said Clark giving thirty feet off the north side of the south half thereof; each party hereby promises to the other, faithfully to perform. L. H. Langworthy, Lincoln Clark. Test, F. E. Bissell."

The bill alleges, that the parties first made a verbal contract, according to which, defendant was to make a *warranty* deed. It also averred, that defendant purchased from the city of Dubuque, and took such title as it had, without warranty; that a few days after making the verbal contract, defendant came to the plaintiff, for the purpose of giving the deed, and receiving his money; that he brought with him his deed from the city, and then for the first time, *seemed* to have discovered that it was not a warranty deed; that defendant then desired plaintiff to accept a similar one to that which he had, which plaintiff was unwilling to do, and as a consequence, the agreement was modified, and the foregoing written one was substituted for the preceding oral one. The petition also avers, that the parties were to exert themselves to procure the passage of the act of Congress, respecting title; that plaintiff did so exert himself, but that defendant interposed to prevent the passage of said act, at and during the session of Congress aforesaid; and also, that real estate in the said city, including the premises in controversy, has since the making of said contract, greatly appreciated in value; and for this reason, defendant had refused to convey, and had, before the expiration of the session of Congress alluded to, laid off the premises into smaller lots, and was offering them for sale.

The answer admits of the making of the written contract; the tender of the purchase money by plaintiff; and the lay-

ing off the premises into lots, and the demand for a deed; but denies the previous verbal contract as alleged in the bill, as also any interposition to prevent the passage of the act; and avers, that the only agreement ever entered into, was the written one of July, 1853; that by the terms of which, as he claims, his agreement to convey was to be void, if the said act of Congress should not pass at their next session, and he therefore insists, that the failure of Congress to pass said act, released him from any liability to convey the premises; and that since the adjournment of said session, the said contract has not been binding upon either party. The session of Congress next ensuing the date of the agreement, terminated in September, 1854, but no act was passed confirming this title, either in the city or said defendant. The charge of interposition by defendant, to prevent the passage of the act, is supported by the testimony of one witness. Such being the issue and proof, the court below decreed in favor of plaintiff, requiring defendant to make a warranty deed, and from this decree, he appeals.

Wiltze & Blatchly, for the appellant.

Smith, McKinlay & Poor, for the appellees.

WOODWARD, J.—Whether the decree of the court below can be sustained, we think must alone depend upon the construction to be given to the written agreement. The complainant claims, that the proviso therein contained, relates alone to *the time of payment*, and that the true meaning of the language used, is that he bought the lot, and was to have credit for the purchase money, until the act of Congress passed; and that if the act did not pass at that session, he was to pay at all events on the adjournment, and was then entitled to a deed. On the other hand, the respondent claims, that the proviso refers to the *contract of sale* in its effect, making the agreement to mean, that if the act did not pass at that session, the contract was at an end. And while we have had some difficulty in arriving at a satisfactory conclusion, in construing

the instrument, we have finally determined that the proper construction is that claimed by respondent. It appears to us, that the view taken by complainant, would give the proviso little or no meaning, and would take away all force justly due to the reference made to the *passage of the act.* This construction would make that event of no consequence in the contract, leaving it, (the contract,) to mean simply, that the complainant was to have until the end of next session to make payment. It is true, that the form of the contract is that of a sale from respondent to complainant of these premises sought to be recovered. But granting this, let us apply a test to aid us in the construction. *No act having passed,* could respondent compel a performance against complainant? We think clearly not, and that complainant might well answer to a suit brought for the purchase money, that he agreed and undertook to pay at the time of *the passage of the act, provided* one did pass, confirming the title; and that as none was enacted within the time limited, he was, therefore, no longer bound. But we ask, again, is the reference to the act of Congress of no meaning in the negotiation, or has it some force? We may be aided in further answering this question, by a brief reference to the circumstances preceding the making of the written agreement, as detailed in complainant's bill. It appears that respondent obtained title from the city of Dubuque, and then, when the parties met, it was ascertained that he could not make a warranty deed, as had been previously agreed upon by their verbal contract. Respondent on discovering this, desired complainant to accept the same kind of a deed as he had from the city, but this complainant refused; and they, therefore, made the written contract. Under such circumstances, how can it be claimed that the passage of the act was of no consequence, or that it was referred to as a mere indifferent event? Respondent was unwilling to warrant the title, as it then stood, and complainant was unwilling to take it without. There was evidently doubt as to the title, and it was deemed important to have it confirmed by the action of Congress. Did not complainant, therefore, buy upon the condi-

tion of such confirmation? And why did respondent refuse to give a warranty deed, as the title then stood, and at the same time undertake to thus convey, though no confirming act should be passed, and though the title might be of the same character, and no better than it then was? It would certainly seem inconsistent to suppose that respondent would agree to make a warranty title, when it is shown that he had not, and that he *knew* he had not, such an one, and especially so, when we superadd the fact, that both parties acted upon the supposition that the Congressional act of confirmation, was necessary to perfect his title. But, on the contrary, it does seem to be consistent to say, that the very character of the title, as it then stood, was a strong reason why the performance of the contract on the part of the respondent, was made dependent upon the passage of the act?

We conclude, therefore, that the *passage of the act* was not an indifferent event in this contract, and that it was upon the condition that this act was passed, within the time designated, that respondent was bound to convey the lot. We are also of the opinion, that this contract could not be enforced against complainant, and that, therefore, he cannot enforce it against respondent.

The charge in this bill, that respondent interposed to prevent the passage of the act of Congress, is denied in the answer, and is unsustained, except by the testimony of one witness. We need hardly say, that this part of the bill is not legally supported. The denial in the answer cannot be overcome by the testimony of a single witness.

Decree reversed.

FULTZ *v.* BLACK.

Where in an action of forcible entry and detainer, in which the petition alleged that the defendant forcibly entered upon the prior actual possession of the plaintiff's premises, and continues to wrongfully and forcibly detain the same, the court instructed the jury as follows: "That if the defendant had in good faith entered upon the premises in dispute, without any knowledge of a prior adverse claim, and made valuable improvements, and had possession of the same for thirty days, prior to the commencement of this action, they must find for the defendant," to which the plaintiff excepted; *Held*, That the instruction in no sense came up to the letter or spirit of section 2371 of the Code, and was erroneous.

In such cases, where the bar of the statute is relied upon, it is necessary to show, that the defendant's possession has been peaceable and uninterrupted, and that the plaintiff *had knowledge* of such adverse holding.

Appeal from the Greene District Court.

THIS was an action of forcible entry and detainer, commenced before a justice of the peace, and appealed by defendant to the District Court. The plaintiff there moved to dismiss the appeal, and on the trial objected to the introduction of any testimony by defendant, which motion and objection was overruled. Against plaintiff's objection, and at defendant's request, the jury was instructed, as shown in the opinion of the court. Verdict for defendant—motions in arrest, and for a new trial, overruled; judgment on the verdict; and the plaintiff appeals.

Brown & Elwood, for the appellant.

James D. Templin, and *James W. Woods*, for the appellee.

WRIGHT, C. J.—The motion to dismiss, and the objection to the testimony of defendant, we need not notice, as the judgment must be reversed, because of the error contained in the instruction asked and given. We may say, however, that the motion and objection both appear to have been based upon a mistaken view of the record, and to have been

properly overruled. The instruction asked and given the jury, was as follows: "If defendant had in good faith, entered upon the premises in dispute, without any knowledge of a prior adverse claim, and made valuable improvements, and had possession of the same, for thirty days prior to the commencement of this action, they must find for defendant." Section 2372 of the Code, provides, "that thirty days peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued, is a bar to this proceeding," to wit: the remedy for forcible entry, and detention of real property. This instruction was doubtless given in view of this section; but in no sense does it come up to its letter or spirit. The petition alleges that defendant forcibly entered upon the prior actual possession of plaintiff's premises, and continued to wrongfully and forcibly detain the same. If the bar of the statute was relied upon, it was necessary that defendant's possession should have been peaceable and uninterrupted; and that *plaintiff should have had knowledge* of such adverse holding. Neither the good faith with which defendant entered upon the premises, nor his want of knowledge of any prior adverse claim, nor his improvements, were material or important, nor could they all combined, defeat plaintiff's action. Whatever the motives of the defendant in making the entry—however much he might have known of plaintiff's prior right to the possession—and though he may have made no improvements his defence was complete, if he had thirty days' peaceable and uninterrupted possession, with the knowledge of plaintiff, after the cause of action accrued. We think, therefore, that this instruction was improperly given, and that the judgment must be reversed.

Judgment reversed.

Bowman v. Torr.

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The word "claim," when used in connection with the public lands, signifies a settler's right or improvement, or a tract of land, the fee of which is in the government.

A "claim," on the public lands, is personal property.

A party selling a "claim," warrants the title; and if the title fails, he is liable at least for the purchase money, with interest.

The rule that parol evidence is not admissible, to contradict, vary, or add to a written instrument, is not infringed by such evidence tending to show that the contract is altogether void, or never had any legal existence or binding force.

Fraud, practiced by one party to the contract upon the other, in that which is the subject matter of the action or claim, may be shown by parol evidence; and this, not to vary, contradict, or add to the writing, but to show that it never had any binding force or effect.

The appellate court will not reverse a cause, on the ground that the verdict is against the weight of evidence, unless the case be very clear.

Where an action was brought to recover damages for the alleged fraud of the defendant, in the sale of a claim on the public lands, in which the petition averred, that the defendant, as evidence of the sale, gave to the plaintiff a written instrument as follows: "March 24th, 1852. Know all men by these presents, that I, H. T. for and in consideration of the sum of $500.00, do bargain, and sell to S. B. my claim and improvements, on section two, township 85, range 19 west; the said T. to give possession of the kitchen and smokehouse, on the first day of April, and entire possession on the first day of October;" and where the petition further alleged, that at the time of the execution of said writing, the defendant represented that the said "claim," was not entered, and then and there verbally agreed and undertook, to refund the purchase money, if it was so entered; that the claim was in fact, entered, and defendant knew it; and that defendant had neglected and refused to refund said purchase money; and where the answer denied the verbal contract alleged in the petition; and where the evidence tended to show that the purchase money had been paid, and to establish such verbal contract; and where the defendant objected to all testimony of any further or other agreement, other than that contained in the written one, which objection was overruled, and the evidence admitted; *Held*, 1. That if the title to the claim had failed, the defendant was liable for the purchase money, with interest, without proof of any agreement to that effect, and that the law raised an implied undertaking to that extent. 2. That the evidence, in no manner, increased the liability of the defendant, and its admission could work no prejudice to him. 3. That the evidence was properly admitted, to show the manner in which the fraud was practiced. 4. That the verdict was sustained by the testimony.

Appeal from the Mahaska District Court.

THIS action was brought to recover damages for the alleged fraud of the defendant in the sale of a "claim" on the public lands. It is averred in the petition, and not controverted, that the defendant as evidence of the sale, gave to plaintiff the following written instrument: "March 24th, 1852. Know all men by these presents, that I, Harvey Torr, for and in consideration of the sum of five hundred dollars, do bargain and sell to Samuel Bowman, my claim and improvements on section two, township 85, range 19 west, the said Torr to give possession of the kitchen and smoke-house on the first day of April, and entire possession on the first day of October. Harvey Torr." At the time of the execution of this instrument, the defendant was paid ninety-five dollars, and the evidence tends to show that he afterwards received the remaining portion of the purchase money. The petition further alleges, that at the time of the execution of said writing, defendant represented that the said "claim" was not entered, and then and there verbally agreed and undertook, to refund the purchase money, if it was so entered; that it was in fact entered, and that defendant knew it, and though requested, had neglected and refused to refund said purchase money. This part of the contract is denied in the answer. On the trial, the defendant objected to all testimony of any other or further agreement than that contained in the writing signed by him; but the objection was overruled, and testimony was permitted to go to the jury, tending to establish such verbal contract. Verdict and judgment for plaintiff, and defendant appeals.

Clarke & Henley, and *Samuel A. Rice*, for the appellants.

J. A. L. Crookham, for the appellees.

WRIGHT, C. J.—The errors relied upon in argument, are: *First*, that the testimony of the verbal agreement was improperly admitted, because it tended to contradict, vary, or

add to, the written contract; and, *Second.* If admissible, it was not sufficient to sustain the verdict.

The writing signed by defendant is very brief, and appears to be nothing more than a memorandum, showing that he had sold to plaintiff his "claim," on a certain section of government land. In this writing, however, nothing is said as to defendant's liability in the event of the land's being entered. It is said, that the object of this testimony, was to show what was to be his liability in that event. Viewed in this light, we unite in the opinion that the testimony does not tend to *contradict* or *vary* the language used in the writing. We are not unanimous in the opinion, however, that treated simply in the light of a parol contemporaneous agreement, it does not tend to *add* to the written agreement. But as we think the testimony was properly admissible on other grounds, we need not determine this question. The declaration claims damages for the alleged *fraud* of the defendant, in the sale of this claim. Having sold the "claim," it being personal property, he warrants the title. Under such circumstances, if the title failed, he would at least be liable for the purchase money, with interest; and, therefore, without proof of any agreement to that effect, the law raises an implied undertaking to that extent. The proof of such an agreement, in no manner increases his liability; for to that extent, he is bound at all events by his written contract of sale. In this view of the case, the admission of this testimony could work no prejudice to defendant.

But again, it has been uniformly held, that the rule that parol evidence is not admissible to contradict, vary, or add to, a written instrument, is not infringed by evidence tending to show that it is altogether void, or *never had a legal existence or binding force.* Fraud, practiced by one party to the contract upon the other, in that which is the subject matter of the action or claim, may therefore be shown by parol; and this, not to vary, contradict, or add to the writing, but to show that it never had any binding force or effect. It being charged, therefore, in this petition, that defendant practiced a fraud on plaintiff, in the sale of this "claim," and

it being further averred that he knew at the time of the sale, that the same was entered, we think this testimony was admissible to show the manner in which the fraud was practiced. The word "claim," when used in connection with the public lands, has with us a known and definite signification. It refers and relates to a settler's right or improvement, on a tract of land, the fee of which is in the government. And we can, therefore, readily see, that proof that a vendor of such a "claim," represented the same to be unentered, and promised to refund the purchase money, if his statement was untrue, would be well calculated to deceive the vendee, and be a strong inducement to the contract. If upon the faith of such false representations, he obtained the plaintiff's money, he was bound at least to refund it. For the purpose of establishing this fraud, we think this testimony was admissible.

As to the second error, we have no hesitation in saying, that the testimony to sustain the verbal contract, is slight indeed. The view above taken, however, renders its sufficiency comparatively unimportant. For, if the defendant was by the written agreement, at least, liable to the extent attempted to be shown by what is termed the verbal contract, the parol testimony was unnecessary, and its admission could not prejudice appellant. But aside from this, we cannot conclude that the verdict was, in this respect, so manifestly against evidence as to justify the granting of a new trial. It must be a clear case, indeed, as we have frequently held, before we will reverse a case on the ground, that the verdict was against the weight of evidence. In this case, we cannot say that the jury might not reasonably and fairly have concluded, that the plaintiff's allegation was sustained by the parol testimony.

Judgment affirmed.

TOMLINSON *v.* TOMLINSON.

Where a party is seeking to set aside an award of arbitrators, the burden of proof is upon him, to clearly satisfy the court of any alleged mistake, and that he was prejudiced thereby; and also to show, that if the mistake had not occurred, the award would have been different.

Where it is sought to set aside the award, on the ground that certain matters were in fact before the arbitrators, within the terms of the agreement, which were not acted upon, or examined by them, the same rule prevails.

Where certain suits between the plaintiff and defendant, then pending in court, were referred to fiv earbitrators, who were to report at the next term, which submission provided, "that all the matters in dispute, including the matters involved in said actions," should be so submitted; and where the arbitrators at the next term of the court, filed their award, finding a certain sum for the plaintiff, "in full payment, discharge, and satisfaction, of all claims and demands growing out of said controversy," and declaring certain notes held by defendant against plaintiff, to be null and void, and ordering the same to be canceled, upon which award the plaintiff moved for judgment; and where the defendant moved to set aside the award, because of the facts stated in the affidavits filed with the motion, viz: that of defendant and one O. which were substantially as follows: That defendant was not aware of the nature of the award, until the day previous; that the arbitrators did not hear all his case; that they especially refused to take into consideration a certain deed from one P. and wife, to the plaintiff, and a letter from the plaintiff concerning the same; that defendant owns the property described in the deed, but the title is in plaintiff, who refuses to convey the same; that certain other real estate in the name of plaintiff, was paid for by defendant, and plaintiff refuses to convey the same; that these matters were among the difficulties existing at the time of agreement to arbitrate; that the arbitrators heard testimony on the subject, and had not reported on the same in their award; that defendant presented to the arbitrators, the said deed and letter; and that one of them had said, "that they did not take said deed and letter into consideration;" and where the letter referred to in the affidavits, was addressed to the justice of the peace, before whom the deed was acknowledged, and instructed the justice to deliver the deed to the defendant, "as he had paid for the land, and the right should be to him for the same;" and where the motion to set aside the award, was overruled, and judgment was rendered on the award; *Held*, That the evidence did not afford sufficient ground to set aside the award, and that the motion was properly overruled.

Appeal from the Jackson District Court.

Two actions were pending in the Jackson District Court,

one in favor of Jesse, and the other in favor of Jesse and J. H. Tomlinson, against the defendant. At the April term, 1854, of that court, said causes were, by consent of parties, submitted to certain named arbitrators, who were to report at the next term. The matters submitted, sufficiently appear from the following extract from this agreement to arbitrate: "and that all the matters in dispute, including the matters involved in both of said actions, shall be referred to the arbitration and decision of," [naming the arbitrators.] At the next term, the arbitrators filed their report, finding a certain sum in favor of Jesse Tomlinson, "in full payment, discharge and satisfaction, of all claims and demands growing out of said controversy; and further declaring certain notes held by defendant against the plaintiff, to be null and void, and ordering the same to be delivered up and canceled." Plaintiff moved for judgment on said award, and defendant moved to set the same aside, "because of the facts set forth in the affidavits," filed therewith. These affidavits are substantially as follows: The defendant swears that he was not aware of the nature of the award, until the day previous; that the arbitrators did not hear all his case; and that they especially refused to take into consideration, a certain deed from one Pan and wife to the plaintiff, James H., and a letter concerning the same; that defendant owns the property therein described, but that the title is in James, and he refuses to deed the same; that certain other real estate in the name of Jesse, was paid for by defendant, and that he refuses to convey the same; that these matters were among the difficulties existing at the time of the agreement to arbitrate; and that they did hear testimony on the subject, but have not reported on the same in their award. Accompanying this affidavit, is the deed, and also a letter, from James H. to the justice who took the acknowledgment, in which the justice is instructed to deliver the same to defendant, "as he has paid for the land, and the right should be to him for the same." The deed was made in September, 1851. The letter is dated in October, but the year is not shown. The affidavit of one Ormsby, was also filed, in which he states that

he was present at the time the case was heard by the arbitrators; that defendant presented to them this deed, and the letter aforesaid; and that one of the arbitrators said to him, that they did not take said deed and letter into consideration. The motion to set aside was overruled, "for want of sufficient notice of same, and for want of good and sufficient grounds therefor." The motion for judgment on the award was sustained, and judgment rendered in each case, in accordance with the finding of said arbitration, and defendant appeals. The errors assigned are:

1. The court erred in overruling the motion to set aside the award.

2. In rendering judgment for the plaintiff on the award.

Smith, McKinlay & Poor, for the appellant, cited the following authorities: Code, § 2110; *McNear* v. *Bailey*, 18 Maine, 253; *McDonald* v. *Bacon*, 3 Scam. 429; *Butler* v. *Mayor of New York*, 1 Hill, 489.

Burt & Barker, for the appellee, relied upon the following: *Butler* v. *Mayor of New York*, 1 Hill, 489; *Deane* v. *Coffin*, 5 Shep. 52; *Van Landingham* v. *Lowery*, 1 Scam. 240; *Caton* v. *McTavish*, 10 Gill & Johns. 192; *Carter* v. *Sams*, 4 Dev. & Bat. 182; *Harris* v. *Seal*, 10 Shep. 435; *Portland Manuf. Co.* v. *Cox*, 6 Ib. 117; *Gibson* v. *Powell*, 5 Smedes & M. 712.

WRIGHT, C. J.—In the case of *Thompson* v. *Blanchard*, 2 Iowa, 44, we had occasion to speak of what testimony might be received, to affect the validity of the award then in suit. There the question arose as to the *admissibility* of the testimony offered, while in this case, we are asked to determine whether that submitted, is *sufficient* to set aside the award? It was held in the above case, however, that the whole burden of proof was on the party seeking to set it aside, and that it was his duty to clearly satisfy the court, of any alleged mistake, and that he was prejudiced thereby. We perceive no reason for changing this rule, and least of all,

would we be willing to recognize one less stringent. In these proceedings, the parties select their own judges, and as a mode of settlement, it should receive every reasonable encouragement from courts of justice. And, indeed, we may go further, and say, that a party should not only make out the mistake clearly and fully, and that he was prejudiced thereby, but also show that if it had not occurred, the award would have been different. *Knox* v. *Symonds*, 1 Ves. 369; *Burchell* v. *Marsh*, 17 How. 344. And the same is true, where in the absence of fraud, it is claimed that certain matters were in fact before the arbitrators, within the terms of the agreement, which were not acted upon or examined by them.

The question, then, is not as to the admissibility of evidence of that character, to impeach an award, but whether that offered is sufficient, or whether it satisfies us of such mistake, or neglect of duty, on the part of the arbitrators, as to afford sufficient grounds for setting aside their finding. These cases must for the most part depend upon their own peculiar circumstances, and it is difficult to find any general rule by which they can be determined. But giving due weight to all the circumstances urged by appellants, and treating their affidavits as entitled to all the credibility claimed, we are not satisfied that this award should have been set aside. We know of no rule upon which we would be justified in disturbing it, and there are no circumstances of an equitable character, to satisfy us that the party should be again heard. There is nothing certainly to show fraud, corruption, or improper conduct, on the part of the arbitrators. The only pretence for setting it aside is, that they did not hear certain testimony, or did not adjudicate and report upon a controversy, or perhaps controversies, between the parties touching the right to certain real estate. To sustain this *allegation*, we have the *ex parte* affidavit of the defendant, corroborated in part, by that of one other person. All that is shown with any degree of positiveness, as to the action of the arbitrators is, that one of them said, they did not consider said deed and letter. Why they did not, is not shown, and for aught that appears, they were entirely justified in

disregarding them. What other testimony they had before them, does not appear. The letter may have been obtained by fraud, and they may have so found; there may have been some subsequent arrangement different in its character, with regard to such property; they may have found that defendant had, after the writing of the letter, been paid the amount claimed to have been advanced by him; and for any of these reasons, as well as many others that will readily suggest themselves, they might have been fully justified in disregarding, or not considering, said deed and letter. To avoid after difficulty and uncertainty in such cases, it is always better that the parties, by their article of submission, should specify particularly what matters are to be passed upon. This method is more apt to protect their several rights and interests, and prevent the very confusion and prejudice, which is claimed to have occurred in this instance. And when they submit *all* matters in difference, as was done in this case, both parties should be required to submit in writing their respective claims, so that in some tangible shape, it may be known what were *all* their differences. In the absence of any showing, that this was done, however, if the arbitrators have found a general sum for one party, or have determined, after hearing the parties, that one of them should do a particular thing, we would be unwilling to interfere with their finding and determination, upon the meagre showing made in this case. *Wellington* v. *Warner*, 10 Metc. 431; *Warfield* v. *Holbrook*, 20 Pick. 531; *Karthans* v. *Fener*, 1 Pet. 227; Story on Cont. § 85 *b*. If their failure to specifically report as to the situation and ownership of the property referred to in appellant's affidavit, shall result in his prejudice, we think such prejudice should be more clearly established, and neglect and mistake on their part, be more fully proved, before we could put the parties to all the expense and trouble of a second investigation. This view of the case, renders it unnecessary to determine whether the motion of appellant to set aside the award in the District Court, was made in time.

Judgment affirmed.

THROCKMORTON *v.* STOUT AND DEVIN.

When a complainant in chancery has obtained his decree, he has a right to suppose the proceedings ended, and is no longer in court.

An application to set aside a decree in equity, and grant a rehearing, must be made by petition, with notice to the complainant, according to the regular course of chancery proceedings.

Where at the April term, 1855, of the Marion District Court, a decree in chancery was rendered in favor of the complainant; and where at the February term, 1856, of the same court—after two terms of court had intervened—one of the respondents, without notice to the complainant, filed a motion or petition to set aside the decree, and grant a rehearing, on the ground of the absence of the attorney of such respondent, which application was not sworn to, or supported by testimony, and which application was sustained, the decree set aside, and a rehearing granted, at the costs of the complainant; and where the order of the court on the application, did not state any reason for setting aside the decree, which decree was regular upon its face; the order setting aside the decree, and opening the cause for a rehearing, was annulled, and the decree originally entered, ordered to stand in full force.

Appeal from the Marion District Court.

A FINAL decree was rendered in this cause, at the April term of the District Court of Marion county, 1855, in favor of the complainant. At the February term, 1856, on motion of the defendant Devin, the decree was set aside, and a rehearing granted, at the costs of the complainant, such rehearing to take place at next ensuing term. To this order setting aside the decree, and setting down the cause for rehearing, the complainant excepted, and appeals to this court.

J. E. Neal, for the appellant.

Knapp & Caldwell, and *W. H. Seevers*, for the appellee.

STOCKTON, J.[1]—It appears from the record, that two

[1] WRIGHT, C. J., having been of counsel, took no part in the determination of this cause.

terms of the District Court of Marion county, had intervened between the time of rendering the decree, and the time of setting it aside. The order of the court, setting aside the decree, does not state for what reason it was set aside, and it is only from the motion of defendants, that we gather that the defendant's attorney failed to attend to the suit, but whether such failure was occasioned by absence, sickness, or other inability, is not stated, and is in no wise made to appear. The motion was unsupported by testimony, and was not even verified by the oath of the party in whose favor it was granted, as to the truth of the facts stated.

The decree itself was regular on its face, and was made with due notice to the defendants, and they both appeared to the suit by their attorney. It would undoubtedly introduce great confusion and uncertainty into the administration of justice, if this court should sanction the proceedings of the District Court in this case. Parties would never know when there was to be an end of litigation—they would never know when their rights were secure—if, at a year's interval—after two terms of court have intervened—the defendants can be permitted to come into court, and without any cause shown, upon a mere motion, and without notice to the other party, have a decree entered against them set aside, and the cause re-opened for new testimony and a new trial. There is no precedent for any such proceeding. When the plaintiff had obtained his decree, he had a right to suppose the proceedings ended, and he was no longer in court, unless regularly notified that an application was made to set aside the decree and grant a rehearing, on petition and notice, according to the regular course of chancery proceeding. *Radley* v. *Shaver*, 1 Johns. Ch. 200; *Bennett* v. *Winter*, 2 Ib. 205.

The order of the District Court setting aside the decree, and opening the cause for rehearing, is annulled, and the decree originally entered, ordered to stand in full force.

AYRES *v.* CAMPBELL.

By pleading over, and going to trial, a party waives his demurrer. If he wishes to save the matter of the demurrer, he should stand upon it.

This practice does not preclude a party from filing an answer or replication with his demurrer; but if he designs to adhere to the latter, he should either withdraw his other pleadings, or cause the record to show that he abides by the demurrer.

The competency of a witness, is restored by a release.

Appeal from the Guthrie District Court.

THIS cause was before this court, at the June term, 1855, and is reported in 1 Iowa, 212. It is also a part of the transaction from which arose that of *Campbell* v. *Ayres*, 1 Iowa, 257. The facts are fully stated in the former case, in 1 Iowa, 212, except so far as may be noticed hereafter in the opinion.

Jewett & Hull, for the appellant.

Bates & Finch, for the appellee.

WOODWARD, J.[1]—As this cause is now presented to the court, the plaintiff and appellant assigns for error, that the court overruled the plaintiff's demurrer to a part of the defendant's answer. We shall not enter, in detail, into these causes of demurrer, but will only remark that the matters are probably not well pleaded in manner, but would seem to be good, if sustained, in substance. They are thus passed, because the plaintiff has pleaded over and has gone to trial. If he wished to save the matter of the demurrer, he should have stood upon it. This practice does not preclude a party from filing an answer or replication, with his demurrer, but if he

[1] WRIGHT, C. J., having been of counsel, took no part in the decision of this cause.

designs to adhere to his demurrer, he must either withdraw his other pleadings, or cause the record to show that he abides by the demurrer.

The other error assigned, is upon the admission of the same Crews to testify. There is no bill of exceptions, but there is a certificate of the clerk and an affidavit of the plaintiff's attorney, that one was taken, and signed and filed, and that it is lost or destroyed. An affidavit of the defendant's attorney, impliedly admits that there was such a bill, but avers that the said bill stated that before said Crews testified, he produced to the court a written release from said James Campbell, by which said Campbell released him from all and every liability, indebtedness, or cause of action, relating to the sale and transfer of said lot mentioned in the petition and answer, and every matter relating thereto. Taking these affidavits as sufficient to show the existence once, and the loss of a bill of exceptions, the cause is brought to the point of the adjudication in 1 Iowa, 212, and such release appears to us to restore the competency of Crews. Therefore, the judgment of the District Court is affirmed.

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78 156

HAHN *v.* CUMMINGS.

Where in an action for damages, for selling the plaintiff one tract of land, and fraudulently conveying to him another and different tract, the cause was tried by the court, without a jury, and the court found for the plaintiff, the difference in value between the land shown to the plaintiff, and that conveyed to him by the defendant, to wit: four hundred dollars, and thereupon judgment was rendered for the plaintiff, for the sum of four hundred dollars, and costs, with stay of execution, until the plaintiff reconveyed to the defendant, the land conveyed by him to the plaintiff; and where the plaintiff filed a motion to vacate the order for the stay of execution, and the reconveyance of the land to the defendant, which motion was overruled; *Held*, 1. That the court erred in overruling the motion to set aside the order; 2. That the measure of the plaintiff's damages, was the difference in value between the two pieces of land.

Appeal from the Buchanan District Court.

THE plaintiff claims of defendant the sum of four hundred dollars, on the following cause of action: that plaintiff had at the request of defendant, entered into a negotiation with him for the purchase of a tract of land, described as the east fractional half of northeast quarter, and northwest quarter of southeast quarter of section three, ninety north, eleven west, in Black Hawk county. That defendant, for the purpose of effecting a sale of the land, took plaintiff upon and showed him the west half southwest quarter of section two, and southeast quarter of southeast quarter of section three, ninety north, eleven west, and falsely and fraudulently represented to plaintiff, that the land which defendant showed him, was the first-named tract which defendant wished to sell; and that plaintiff confiding in the representations of defendant, agreed to purchase of him the tract of land first above described, supposing it to be the land which defendant had showed to him, and paid to defendant therefor, a wagon, two horses and harness, valued at $400, and defendant procured the said land first described, to be conveyed to plaintiff. The petition further states, that the land shown to plaintiff by defendant, was well worth the sum of $400, but the tract of land conveyed to plaintiff, was entirely worthless and of no value whatever. Wherefore, he claims damages. The answer of defendant is a specific denial of the allegations of the petition; issue being joined, there was a trial by jury, and verdict for the plaintiff for the amount claimed in his petition. This verdict, on motion of defendant, was set aside by the court, and a new trial ordered. The reasons for setting aside the verdict do not appear in the record. At a subsequent term of the court, the record shows, that "the cause coming on for trial, the issues of law and fact are submitted to the court by agreement of parties, with leave to either party to except. And the court having heard the evidence, finds for the plaintiff, the difference in value between the land shown by defendant to plaintiff, and that conveyed to plaintiff, to be four hundred dol-

lars. It is, therefore, adjudged that judgment be entered for the plaintiff for said sum of $400, with costs of suit, with stay of execution, until the plaintiff reconveys to the defendant the land conveyed by defendant to plaintiff." The plaintiff filed his motion to vacate the order for stay of execution, and for the reconveyance of the land to defendant, which motion was overruled, and from which decision the plaintiff appeals.

Smith, McKinlay & Poor, for the appellant.

W. T. Barker, for the appellee.

STOCKTON, J.—It is assigned for error by the appellant, that the court affixed as a condition to the judgment of $400, in favor of plaintiff, that execution therein be stayed, until plaintiff should reconvey to defendant the land he had conveyed to plaintiff, and that the court refused to set aside so much of the judgment and order as relates to the stay of execution and reconveyance. What the testimony before the court was, we do not know. But we have sufficient in the record to convince us, that the District Court erred in refusing to grant the motion of plaintiff to correct the judgment as entered. The court finds that plaintiff is entitled to recover of defendant, the difference in value between the two tracts of land. And this difference it further ascertained to be four hundred dollars. For this amount plaintiff is entitled to judgment, without stay of execution, and without any condition for re-conveyance of the tract of land conveyed to him. This was not an action to recover back the purchase money. It was to recover damages for the fraud alleged to have been practiced on the plaintiff. Taking it that the plaintiff made out his case to the satisfaction of the court, which found the verdict in his favor, he was entitled to recover as damages the difference in value between the land the defendant induced him to believe he was buying, and the land that was conveyed to him. The measure of his damages was the difference between the two, found by the

court to be four hundred dollars, and for this he is entitled to judgment. The judgment of the District Court denying the motion of plaintiff to vacate the order for stay of execution, and for the reconveyance of the land to defendant, is reversed, and the cause is remanded, with instructions to the District Court to enter judgment for the plaintiff on the finding of the court in his favor, for the sum of four hundred dollars.

Judgment reversed.

STRUBLE *v.* MALONE.

In an action on the transcript of a judgment rendered in another state, the defendant cannot raise the objection, that the process in the original action, was not served by any officer known to the law, or one authorized to serve such writs.

Where in an action on a judgment rendered in another state, the defendant answered, averring that the defendant, at the time of the alleged service of the original summons, was not a resident of the state where the judgment was rendered; that he was not served with notice of the pendency of said suit; and that he had no agent or attorney in said state, authorized to appear or acknowledge service for him, to which answer a demurrer was sustained; *Held*, 1. That the answer was insufficient. 2. That the averments in the answer, should have been followed by the allegation, that the defendant did not voluntarily appear in the original action.

Appeal from the Lucas District Court.

THIS action was brought to recover the amount of a judgment rendered against defendant by the Court of Common Pleas of Guernsey county, Ohio. Judgment for plaintiff, and defendant appeals.

J. E. Neal, for the appellant.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—It is first urged by appellant, that the

summons issued from the common pleas court in Ohio, was not served by any officer known to the law, or one authorized to serve such writs. Whatever force this objection might have if urged, on appeal from the original judgment, in the appellate tribunal in the state where said judgment was rendered, it can have none here. *Harts* v. *Cummings*, 1 Iowa, 564; *Latterett* v. *Cook*, 1 Ib. 1.

The next objection is, that the court erred in sustaining the demurrer to defendant's answer. This answer avers that defendant at the time of the alleged service of the original summons, was not a resident of the state of Ohio; that he was not served with notice of the pendency of said suit, and that he had no agent or attorney in said state, authorized to appear or acknowledge service for him. If we grant to defendant the right to deny, at this time, the jurisdiction of said common pleas court, we are still clear that this answer is insufficient. For anything that appears therefrom, said defendant voluntarily submitted to said jurisdiction. All of the averments therein made, should have been followed by the allegation *that he did not appear*, or that he did not voluntarily submit his cause to said court. *Baltzell* v. *Nosler*, 1 Iowa, 588; *Latterett* v. *Cook*, 1 Ib. 1; *Shinnaway* v. *Stittman*, 4 Cowen, 292.

It is finally objected, that the judgment below is for a larger sum than was warranted from the proof. An examination of the record satisfies us that a correct computation of interest, would entitle the plaintiff to a judgment for *more*, rather than *less*, than that given him by the District Court.

Judgment affirmed.

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'if you can't get through, try and get to Charley Reed's, and deliver the goods there—he is the best man.'" And where the court instructed the jury as follows: "Although it is a general principle, that a written contract cannot be varied by parol evidence of instructions given before, or at the time the contract is executed, because all the terms of the agreement are supposed to be expressed and fixed by the instrument; yet you may take into consideration the instruction of the plaintiff to the captain, to store the goods at Reed's Landing, in the event he should be unable to go farther, for this is not a variation or contradiction of the written contract. I say, that so far as it would go to show, that the defendant was entitled to store the goods, if it was impossible for the boat to proceed farther, because of the dangers of the river and the closing of navigation, it would not be a variation, but on the contrary, as rather supporting it, for the bill of lading excepts the unavoidable dangers of the river, and reserves the 'usual privileges,' which is admitted to be the privilege of storing, when, by reason of unavoidable danger from ice, the farther prosecution of the voyage is impracticable;" to which the plaintiff excepted; *Held*, 1. That the danger of interruption of the navigation, entered into, and became a part of the contract. 2. That if the navigation becomes *impracticable*, in consequence of the cold, the storms, or the ice of the season, the boat is excused from *then* fulfilling the contract, either on the ground of the act of the Higher Power, or because of the nature of the contract, and the contingencies which may well come within the contemplation and foresight of the parties, or in view of the clause excepting the unavoidable dangers of the river. 3. That under one or the other of these views, the boat had a right to stop and turn about, *if the voyage became impracticable*. 4. That the declarations of the plaintiff, as proven by the captain, were not to be viewed as varying the contract, or changing the liability of the boat, but were to be regarded only as directions *with whom* to store the goods, if the boat was obliged to stop. 5. That the instruction contained nothing but what pertained to the contract. *Ib.*

6. Where in a suit in chancery to enforce the specific performance of an agreement as follows: "The state of Iowa, July, 1853. Be it remembered that Lucius H. Langworthy, of the city of Dubuque, and Lincoln Clark, of the same place, do hereby covenant and agree with each other, as follows, to wit: The said Langworthy sells to said Clark, the south half of his lot on the bluff at the head of Main street in said city, and bounded on the east, by lot No. 677, and on the west by lot No. 678; for which the said Clark is to pay the said Langworthy the sum of one thousand dollars, when an act of Congress shall be passed, confirming the title to said lot, either in the said Langworthy, or in the corporate authority of said city, of whom the said Langworthy purchased; *provided*, the said act shall be passed during the session of Congress next ensuing. Upon the payment of the aforesaid sum of money, the said Langworthy is to make to the said Clark, a good fee simple title to the piece of land hereby intended to be conveyed, free from all incumbrances, and with the usual covenants of warranty. And the said Langworthy and Clark, mutually agree, each with the other, to make a public street through the middle of said lot, from east to west; the said Langworthy giving thirty feet off the south side of the north half of said lot; and the said Clark giving thirty feet off the north side of the south half thereof. Each party hereby promises to the other faithfully to perform;" the bill alleged, that the parties first made a verbal contract, according to which respondent was to make a warranty deed; that respondent purchased the lot from the city of Dubuque, and took such title as it had, without warranty; that a few days after making the verbal contract, the respondent came to the complainant, for the purpose of giving the deed, and receiving his money; that he brought with him his deed from the city, and then for the first time, *seemed* to have discovered that it was not a warranty deed; that he desired the complainant to accept a similar one to that which he had, which the complainant was unwilling to do, and as a consequence, the agreement was modified, and the written agreement substituted for the oral one; that the parties were to exert themselves

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2. In such cases, where the bar of the statute is relied upon, it is necessary to show, that the defendant's possession has been peaceable and uninterrupted, and that the plaintiff *had knowledge* of such adverse holding. *Ib.*

FOREIGN JUDGMENT.

1. Where in an action on a transcript of a judgment rendered in the state of Pennsylvania, it appeared from the transcript, that a summons was issued June 21st, 1838, and returned as follows: "Summoned by copy of original, left at the residence of defendants, May 13, 1838." *Held*, That the evidence of personal service on the defendants, was sufficient in the courts of this state. *Taylor, Shipton & Co.* v. *Runyan & Brown*, 474.

2. And where in such a case, it appeared from the precipe, statement, summons, and return copied into the transcript, that on the 21st of May, 1838, the plaintiffs filed the precipe and statement, claiming of defendants the sum of $15,396, in an action of debt, on a sealed note; that on the 21st of June, 1838, summons issued, returnable "on the first Monday of June next," which was returned with the following indorsement: "Summoned by copy of the original, left at the residence of defendants, May 13, 1838. M. Allen, Sheriff;" and where the docket entry was as follows:

		Statement.	Summons.—Debt.
"Howell, Hennikers, Attys for tax,	50	TAYLOR, SHIPTON & CO.	Issued May 21st. Summoned by copy of original, left at the residence of defendants, May 23d, 1838.—$2.53. June 14th, 1838. Judgment *sec. reg.* for want of plea. January 9th, 1839, sum ascertained at $155.07. Interest from June 14, 1838.—
Pro. Sloan,	$2.41		
Atty St.	3.50	*vs.*	
Shiff. A.	2.53		
	$8.44	RUNYAN & BROWN.	

"*Fi. fa.* for debt, interest and costs, to March term, 1839;" *Held*, That the transcript, on its face, did not show a judgment rendered in the courts of Pennsylvania. *Ib.*

3. In an action on the transcript of a judgment rendered in another state, the defendant cannot raise the objection, that the process in the original action, was not served by any officer known to the law, or one authorized to serve such writs. *Struble* v. *Malone*, 586.

4. Where in an action on a judgment rendered in another state, the defendant answered, averring that the defendant, at the time of the alleged service of the original summons, was not a resident of the state where the judgment was rendered; that he was not served with notice of the pendency of said suit; and that he had no agent or attorney in said state, authorized to appear or acknowledge service for him, to which answer a demurrer was sustained; *Held*, 1. That the answer was insufficient. 2. That the averments in the answer, should have been followed by the allegation, that the defendant did not voluntarily appear in the original action. *Ib.*

FRAUD.

1. Fraud, practiced by one party to the contract upon the other, in that which is the subject matter of the action or claim, may be shown by parol evidence; and this, not to vary, contradict, or add to the writing, but to show that it never had any binding force or effect. *Bowman* v. *Torr*, 571.

GARNISHEE.

1. Where a garnishee answers, first, denying generally, that he owes the person as whose creditor he has been garnished, or that he has property,

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the property as sheriff, by virtue of certain executions against S., in which action the principal question was, whether a certain sale of the property by S. to M. was fraudulent and void as to the creditors of S., and on the trial the court instructed the jury as follows: "1. If they believe from the evidence, that the sale of the property by S. to M. was made to defraud S.'s creditors, the sale was fraudulent and void. 2. If they are satisfied by the weight of evidence, that S. sold the property, and still kept possession, the sale was void, unless there was a bill of sale, acknowledged and recorded, like deeds of real estate. 3. If they find that defendant levied on the property, and held it, by virtue of his office, as sheriff, they will find for the defendant," to which instructions the defendant excepted; *Held*, 1. That giving the word *sale* its proper, legal signification, and bearing in mind that there must be a vendee as well as a vendor in such sales, the first instruction was correct. 2. That if the second instruction means, that the sale would be void as between M. and S., unless there was a bill of sale, executed, acknowledged, and recorded, it is clearly erroneous; but that if it related to the rights of existing creditors of S. or subsequent purchasers, without notice, it was substantially correct. 3. That the third instruction was erroneous, and could be true in no probable state of the case. *Miller* v. *Bryan*, 58.

2. Where in action to recover money of the plaintiff, alleged to have been lost by the negligence of the defendant, the court instructed the jury, on its own motion, as follows: "That only slight diligence was required of the defendant in the care of the money, and that he was answerable for gross negligence only;" and where the defendant asked the court to instruct the jury as follows: "That if they find that the defendant knew that the money found by him belonged to the plaintiff, he could recover nothing for the finding, except it was voluntarily given to him by the plaintiff; and that he was an unpaid bailee, and only responsible for gross negligence," which the court refused to give; *Held*, That the two propositions being legally identical, the second was unnecessary; and that the instruction asked by defendant, being based upon an hypothesis upon which it does not appear that there was any evidence, was properly refused. *Dougherty* v. *Posegate*, 88.

3. And where in such an action, the court instructed the jury as follows: "That if defendant found the plaintiff's money, knowing the same to be the plaintiff's, he was bound to make restitution of the same, without compensation:" *Held*, That this instruction is in accordance with the act to provide for the taking up of water crafts found adrift, lost goods, and estray animals, approved January 24, 1852, and was correct. *Ib.*

4. And where in an action to recover for building a house, the court instructed the jury, "that if defendants, or any of them, were at or about the house during the construction thereof, and giving instructions in relation thereto, and they made no objection during that time to the manner of construction, they cannot after the house is completed, and after they have received it, make any objection:" *Held*, That the instruction was erroneous. *Mitchell* v. *The Wiscotta Land Co.*, 209.

5. Where it does not appear from the record, that the giving or refusing to give instructions, was objected to, at the time, the appellate court will not pass upon their correctness. *Rawlins et ux.* v. *Tucker*, 213.

6. A party cannot be permitted to stand by and allow instructions to be given or refused, wait the result of the verdict, and then, for the first time, except to the action of the court in relation to the instructions. *Ib.*

7. Where it appeared from the transcript of a case, that various instructions were given to the jury, but at whose instance was not shown, and the instructions were not signed by any judge, nor were any exceptions taken, and where was found among the papers in the case, a loose paper, purporting to be a bill of exceptions as to one instruction, but the paper was not dated, nor marked filed, nor certified to be a paper in the cause; *Held*, That the appellate court

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rejoinder of the defendant; and where it did not appear affirmatively from the answer of the defendant, or from his testimony as a witness; and where the defendant asked the court to instruct the jury as follows: "That in order to entitle the plaintiff to recover on the ground, that the cause of action still justly subsists, the fact that it does justly subsist, must appear from the answer of the defendant, or from his testimony as a witness," which instruction the court refused to give, but instructed the jury, "that the issue formed by the replication and rejoinder, was immaterial," in which instruction the counsel for the plaintiff acquiesced, and claimed nothing under that issue; *Held*, That under the circumstances, the defendant could not have been prejudiced by the refusal to give the instruction; and that it was not error to refuse it. *Ib.*

12. In order to revive a debt barred by the statute of limitations, it is not necessary that the promise to pay, should have been made *after* the debt was barred by the statute. *Ib.*

13. An admission that the debt is unpaid, or a promise to pay, made *before* the debt is barred, and while an action might be maintained upon it, is sufficient to remove the bar of the statute. *Ib.*

14. Where in an action on a promissory note, the statute of limitations was pleaded, to which the plaintiff replied, a subsequent promise, which was denied by the rejoinder; and where the defendant asked the court to instruct the jury as follows: "That a promise to pay, in order to revive a debt barred by the statute of limitations, must have been made *after* the debt was barred; and that a promise to pay, or an admission that the debt is unpaid, made *before* the debt was barred, and while an action might have been maintained on the note, will not be sufficient to revive the debt," which instruction was refused; *Held*, That the court did not err in refusing the instruction. *Ib.*

15. Section 1670 of the Code, which provides that causes of action founded on contract, are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same, is but declaratory of the common law rule, as it stood before the enactment of the Code. *Ib.*

16. Where in an action on a promissory note, the statute of limitations was pleaded, to which the plaintiff replied a subsequent promise, which was denied by the rejoinder; and where the defendant asked the court to instruct the jury as follows: "1. That under the statute of limitations of 1848, a mere admission of indebtedness did not revive a debt barred by the statute; and that if plaintiff relies on a mere admission that the debt is unpaid, such admission must have been made since the Code took effect. viz: July 1, 1851, to be binding on defendant, and entitle the plaintiff to recover. 2. That any admission contained in the letters of the defendant, dated June, 1848, and February 10th, 1850, are not evidence in this action against the defendant, to show an admission that the debt is unpaid, or that the cause of action still justly subsists, for the reason that they were made prior to July 1st, 1851, when the Code took effect and went in force," which instructions were refused; *Held*, That the instructions were properly refused *Ib.*

17. The statute of limitations should not be viewed in an unfavorable light, or as a defence unjust and discreditable, but like all other statutes should be so construed as to effect the intention of the legislature—that intention being to afford security against stale demands, after the true state of the transaction may be either forgotten, or rendered incapable of explanation. *Ib.*

18. A party may waive the bar created by the statute, and revive the cause of action by a subsequent promise. *Ib.*

19. If this promise is conditional in its character, the plaintiff must show that the condition has happened, else the defendant is not liable. *Ib.*

20. The cause of action may be revived, not only by a promise to pay, but also by an acknowledgment of the debt. *Ib.*

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and after the first day of August, 1847, recited that the partnership had been made verbally about the 20th of April, 1846, and actually commenced at that time; *Held*, That the previous parol agreement was to be taken as the same in terms with the written; that the written articles must govern as to the duration of the partnership, and the interest of the partners; and that whatever was invested in the partnership business, prior to the writing, must be regarded as belonging to the firm under the written articles. *Ib.*

4. Where a bill in equity by the surviving partner, against the personal representatives and the heirs at law of the deceased partner, to settle up the partnership business, which business related to both personal and real estate, alleged that on the 20th of April, 1846, the petitioner entered into a verbal contract with J. F. and J. S. F. for the formation of a partnership to engage in the purchase of lands and farming, that after they had so engaged in said business, to wit: on the 20th of November, 1847, they reduced the said agreement to writing; that by said agreement, J. F. was to furnish and put into said firm as capital, $2,000, to buy lands, live stock, and farming utensils of various descriptions; that J. S. F. and petitioner were to devote their time and best endeavors to promote the interests of the company; that J. F. should have one-half of the property owned by said company; and J. S. F. and petitioner, each one-fourth, which was the basis upon which a division of the assets of the company was to be made at the expiration of the company; that the business was to be conducted in the usual way of conducting farming, &c.; that by virtue of said agreement, J. F. entered and purchased certain lands in Polk county (describing them;) that the said company made large and valuable improvements on the same; that in April, 1849, J. S. F. sold his interest in the firm to J. F. and left the country; that the lands were entered in the name of J. F., who held the title at the time of his death; that from the time of making the said verbal agreement until the first of October, 1850, the petitioner continued to work on said lands, and gave his sole attention to the affairs of the company; that at the time last named, in pursuance to notice to that effect, as provided for in the agreement, the affairs of said company were closed; that before this, to wit: in June, 1850, by agreement between J. F. and petitioner, a certain portion of the lands were surveyed, and understood between them, as that which petitioner was to have as a portion of his share of said lands, which said lands were as follows (describing them); that in pursuance of such agreement, petitioner built a house and made other improvements thereon, in the expectation that when the division took place, he would get said land; that he moved into said house, where he still resides; that petitioner and J. F. had a full settlement and division of all the personal property belonging to the company, with exceptions, which are mentioned; that petitioner and J. F. were unable to agree and settle with regard to a division of said lands first described; that J. F. at the time of said settlement, admitted that petitioner was entitled to, and ought to have, as portion of his share, the lands described, on which he was then building the house, &c.; that J. F. died on the 6th of May, 1852, never having conveyed said lands, or any part thereof, to petitioner; that petitioner performed every part of his agreement of partnership; that the executors and heirs at law of the said J. F. have neglected and refused to divide the property and settle the partnership business, according to, and in the manner pointed out by, the articles of copartnership, &c., to which bill there was a demurrer on various grounds, which was sustained by the court, and the bill dismissed. *Held*, 1. That inasmuch as the bill stated the amount of capital stock furnished by each partner, it laid a sufficient basis on which to proceed. 2. That if the deceased partner furnished more capital after the commencement of the partnership, his representatives might show the fact, and the bill was not defective because it did not state whether he did or not. 3. That the fact that the lands were purchased in the name of J. F. was no bar, after his death, to the claim of the complainant. 4. That the contract of partnership being in writing, signed by the parties, and containing all the essential matters which could, in the na-

ture of things, be specified, and the land and other property to be bought and used, being to be determined in the future, the objects to which the contract applied might be pointed out by evidence, without any violation of the rules of law in relation to written contracts, or to contracts concerning land. 5. That the complainant's cause, taken together, could not be conducted in the county court. 6. That sections 1362 and 1363 of the Code, present no obstacle to the prosecution of the suit in the District Court. 7. That in making the personal representatives and the heirs at law of the deceased partner, parties to the suit, there was no misjoinder of parties. 8. That the averment in the bill, that the heirs and representatives of the deceased partner, had refused to settle up the business, and divide the property, in the manner specified in the articles of copartnership, gave a sufficient reason for applying to the court to settle the partnership. 9. That the bill disclosed matter upon which the District Court could act, and over which it possessed original jurisdiction. *Ib.*

5. In a suit in equity to settle up a partnership, where one of the partners is deceased, and where the firm owns real estate, the personal representatives and heirs at law, of the deceased partner, are proper parties to the bill. *Ib.*

6. A surviving partner may take the affairs of the firm into his own hands, and settle them; but this does not cover the case of a deceased partner, who is indebted to the firm; nor does it preclude the survivor from looking to the estate of the deceased debtor partner. *Ib.*

PARTY WALL.

1. Where the plaintiff alleged in his petition, that he is the owner of the south twenty-five feet and five inches of lot No. 72, in the town of Dubuque; that there is a two story brick building thereon, also owned by him, in which he resides, and carries on his business; that the defendants have commenced the erection of a building on the adjacent lot, No. 72 *a*, on the south of the plaintiff's lot, and that they have cut holes in the wall of plaintiff's building, and were preparing and threatening to use the south wall for the purpose of introducing therein, and supporting thereon, the joists and other fixtures of the building by them commenced, without the consent of the plaintiff, and against his express direction, which acts "will be greatly to the damage of petitioner, to wit: in the sum of five hundred dollars;" which petition claimed damages, "for the trespass aforesaid," to the sum of money above demanded, and also asked for an injunction, which was granted; and where the answer of the defendants admitted that the plaintiff was the owner of lot No. 72, and averred that his said building is situate partly beyond the line between lots 72 and 72 *a*, and is in part upon the latter; that one A. is the owner in fee of said lot 72 *a*, which is a corner lot in the block or square; that they are erecting a building on lot 72 *a*, and have cut some holes in plaintiff's wall, in which they intend to insert brick and joists, for the support of their building, as they have a right to do; that before they commenced the erection of their building, the said A. offered to pay the plaintiff, for one-half of said wall: and that he is still ready and willing so to do; and where the plaintiff replied, denying that A. had offered to pay him half the value of the wall, and averring that he has always been, and still is, willing that A. and his lessees should use the wall as a partition wall, on paying him one-half the cost of erecting the same, and one-half the value of the land upon which it stands; and where the testimony of experienced surveyors was taken, as to the location of plaintiff's building, whose evidence was conflicting, and thereupon the court appointed three referees, to survey the lots and report to the court, who reported that the building of the plaintiff, stood in the front two inches, and in the rear six and three-fourths inches upon lot 72 *a*; and where the court dissolved the injunction, and rendered judgment against the plaintiff for costs *Held*, 1. That the case was an action for trespass. 2. That for the want of all those averments in the petition,

PRACTICE IN CHANCERY CASES.

PRACTICE IN CRIMINAL CASES.

PROMISSORY NOTES.

RECEIPT.

REPLICATION.

SETTING OUT FIRE.

SLANDER.

SOUND PRICE.

2. On the other hand, the failure to give a sound price, is ordinarily a strong circumstance, but not conclusive, to show that the parties contracted in view of defects, or the actual value of the thing sold. *Ib.*

SPECIFIC PERFORMANCE.

1. O. M. B., being the warrantee of land warrant No. 10,215, sold it to E., who sent it, with others, to M., to be located on contract. On the 23d of March, 1852, M. entered into an agreement with T. F. B., and at his request, located the warrant on the southeast quarter of section five, in township 79, north of range 43, and gave T. F. B. a bond, in M.'s own name, covenanting to make, or procure to be made, a deed for the premises, and reciting that T. F. B. had executed his note to E. for the payment of the warrant. On the 20th of September, 1852, the warrant being then located, O. M. B. executed to E. a title bond for the said premises, running to him, his executors, administrators, and assigns, covenanting to convey the said land on or before the 12th of June, 1853, provided E. should, on or before that day, pay said O. M. B. the sum of $160.00. Before the day of payment, O. M. B. died, and there was no administrator, nor any one to whom to pay the money, until after the debt became due, when H. was appointed administrator. After this, T. F. B., not knowing that the legal title to the land was in O. M. B., but supposing it to be in E., filed his bill against E. for a specific performance of the contract to convey, made by M., and in October, 1854, the District Court of Scott county, rendered a decree in his favor against E. for the conveyance of the land. T. F. B. afterwards, August 21, 1855, filed his bill in the same court against E. and the heirs and administrator of O. M. B., praying for the specific performance of the contract between O. M. B. and E., alleging a tender of the money due to H., the administrator, and that the money due E. had been paid into court, and remained in the hands of the clerk; and praying that H. and the heirs of O. M. B. may be decreed to convey the premises to the petitioner, and that the money paid into court for H. may be decreed to be paid to H. in discharge of the obligation under the bond from O. M. B. to E. To this bill there was a demurrer, which was overruled by the court. *Held*, 1. That under the decree against E., T. F. B. stands in the place of E, and can claim a performance of the contract between O. M. B. and E. 2. That the covenants in the bond from O. M. B. to E. were mutual and dependent, and neither is strictly a condition precedent. 3. That the payment of the money on the part of E. was prevented by the death of O. M. B., and this being the act of God, saved the forfeiture. 4. That the demurrer was properly overruled. *Barron* v. *Easton et al.*, 76.

2. Where in a suit to enforce the specific performance of a contract to convey real estate, in which contract the complainant was to perform labor, as well as to pay money, it appeared that he had performed the work, and paid part of the money according to the agreement; that he was prevented from paying the balance of the money on the day it became due, by the absence of the respondent; and that he had tendered the money due, with the accruing interest, when respondent refused to receive the money, and convey the land, on the ground that the day of payment had passed by; *Held*, That the complainant had shown himself sufficiently prompt to perform his part of the contract, and was entitled to a specific performance of the contract. *Clark* v. *Sears*, 104.

3. Where an action to enforce the specific performance of a contract to sell and convey real estate, was brought upon a written contract, which provided that the respondent agreed to "sell and convey, by deed of special warranty, unto J. D. Davis, the (land, describing it), on condition, that said Davis pay promptly, time being of the essence of the contract, a certain promissory note, given September 17th, 1853, calling for $270, payable September 17th, 1854. If said note is not paid when due, I am privileged to enter upon and occupy said land, or to allow said Davis to do so, at my option, provided always that interest is paid on said note at the rate of ten per centum

per annum. It is understood by the parties hereto, that the said Davis is to pay all taxes that may accrue on said land, and not to cut timber except for farming purposes. Then this bond to be carried into full effect, provided no pre-emption right attaches upon or vacates my present entry of said land," which bond was dated September 17th, 1853; and where the bill alleged that before the note matured, the respondent made a verbal agreement with the complainant, by which the latter obtained an extension of the time of payment for six months beyond the time originally fixed by the contract, in consideration of which the complainant agreed to pay ten per cent. interest on the whole amount until paid; and also alleged a tender, on the 2d day of February, 1855, of the full amount of principal and interest due on said note, and a demand of a deed, which was refused; and where the answer admitted the making of the written contract, and the tender and demand for the deed; denied any subsequent contract for the extension of time, and any and all other matters alleged in the petition, and averred that the complainant having failed to pay the note at maturity, according to the terms of the written contract, the respondent held said contract forfeited, and so declared said contract no longer in force; that he canceled the note, and claims nothing thereon; that he has, since the maturity of said contract, always been ready and willing to deliver said note to complainant, and that he brings the same into court to be delivered to him; to which no replication was filed; and where but one witness testified to the extension of time; *Held*, 1. That time was of the essence of the contract; 2. That the averment of the bill, that the time of payment was extended, was not sustained by sufficient proof, to entitle the complainant to relief. *Davis* v. *Stevens*, 158.

4. On the 14th of December, 1840, L. C. sold to G. out-lots 25 and 26, in L. C.'s second addition to the town of Davenport, and executed to G. the usual bond for a conveyance, by good and sufficient warranty deed. G. was to pay $500 for the lots; $75 of which was paid at the time, $150 to be paid on June 1, 1841, and the balance in two equal installments, in twelve and eighteen months from the date of the contract. G. never resided in this state, nor have his heirs resided here since his death. G. died in Ohio, July 9, 1844, leaving eight children, all of whom, except one, were minors, and three were still minors on the 25th of April, 1834. At the October term, 1842, of the Scott District Court, L. C. brought suit against G. for the unpaid purchase money due on the bond, to which the defendant appeared by attorney, and a judgment by *nil dicit* was rendered in favor of L. C. at the June term, 1843, for the sum of $464.20, the amount of the principal and interest due on the lots. On the 10th of July, 1843, an execution issued on this judgment, and on the 26th of August following, the sheriff, by virtue of said execution, sold, and L. C. purchased, the southeast quarter of section 14, township 78, range 4, for $373.33, and said out-lots 25 and 26, for $66.66 each. This sale was made under the valuation law of 1843. At the March term, 1844, without notice to G. a motion was made by L. C., to set aside this sale, the cause for which is not shown; which motion was sustained, and a new execution ordered. On the 26th of March, 1844, a second execution issued on said judgment, under which the sheriff sold, and L. C. purchased the quarter section above described, for $270; the two lots for $65 each; and lot four in block 63, for $124, making in all $514. At the time of the second sale, the judgment, interest and costs (including the costs on the first execution), amounted to $523.31. When the first sale was set aside, no order was made as to which party should pay the costs attending the same. L. C. receipted the execution in full, for his judgment and interest. The property not being redeemed, the sheriff executed to L. C. a deed for the property. Lot four in block 63, was sold and conveyed by L. C. to G. There is no evidence to show that G. was in this state, subsequent to May, 1841. About the time of G.'s death, his widow and the older children, knew something of his having purchased certain lots of L. C. in Iowa, but had the impression that their rights were forfeited by neglect, or failure to make payment, and

had no expectation of any benefit therefrom, until about April, 1854, when one of the heirs first visited Davenport on other business. It does not appear positively, that the widow and children of G. had knowledge of the bond to convey the out-lots, at the time of his death, or that they possessed such knowledge for more than six years prior to April 25th, 1854. In April, 1854, the heirs of G. in writing, demanded of L. C. a specific performance of the contract to convey the out-lots, at their own costs, and offered to pay all sums of money that might be owing on the contract. L. C. refused to convey. For some years after the contract with G. property in Davenport depreciated, but it has since greatly increased in value. On a bill filed by the heirs of G. to compel a conveyance; *Held*, 1. That the complainants were not barred by the lapse of six years after their right or title accrued, from prosecuting their suit. 2. That the judgment against G. and the sale of the premises, under the same, did not extinguish the right of the complainants to call for a specific performance of the contract. 3. That L. C. having elected to hold G. to a performance of the contract, by suing on the notes and collecting the money, held the lots in trust for the complainants, and should be required to convey the same. 4. That G. having appeared by attorney in the suit at law on the notes, his heirs could not, without a stronger showing than is made in this case, go back of the judgment, and show that it was rendered for too much. 5. That the first sale on execution having been set aside, without notice to G., L. C. could derive no advantage thereby, and was liable to the complainants for the amounts bid at that sale, on the property. *Wright et al.* v. *Leclaire*, 221.

5. Where in an action to enforce the specific performance of a contract for the sale of real estate, it appeared that the complainant paid part of the consideration at the time of making the contract; that on the day when the final payment became due by the terms of the contract, he went to the house of the vendor, to make the payment, and receive his title; that the vendor was absent from home; that the complainant told his business to a brother of the vendor, and offered the money, who replied that he had nothing to do with the matter, and could not receive the money; that at a given time, the parties met by agreement, when the vendor tendered a proper deed, which the complainant declined to receive, and refused to pay the money; that at the time of the tender of the deed, and the refusal to pay the money, the vendor had title to only a portion of the land; that the mother of the vendor, at the same time, tendered a deed for a portion of the land, to which she had the title, but demanded two dollars more per acre, than the contract price; that the title to another portion of the land, was in other parties; that there were incumbrances on the land; that there was no proposition by the vendor, that the purchase money should be applied to the liquidation of incumbrances; and that he subsequently tendered the remaining portion of the purchase money, and demanded a deed; *Held*, That the complainant was justified in withholding the purchase money, and refusing the deed, under the circumstances, and that he had committed no default, by which his rights under the agreement were forfeited. *Shreck* v. *Pierce et al.*, 350.

6. A complainant in chancery, may ask for the correction of a mistake in a written contract, and that it be specifically enforced, when so corrected. *Ring* v. *Ashworth et al.*, 452.

7. A party *seeking* a specific performance of a written agreement, stands in no different position as to his right to have a mistake in the contract corrected, than a party *resisting* such specific performance. *Ib.*

8. Where in a proceeding to enforce the specific performance of a contract to convey real estate, it appeared that the land was described in the contract as follows: "fifty-nine 37-100 acres of land, being so much of the west half of the northeast quarter of section twelve, in township eighty-one, north of range six of the fifth principal meridian;" and where it was objected that the contract was void, for uncertainty in the description of the land; *Held*, That the description was not so uncertain as to render the contract void. *Ib.*

STEAMBOAT.

1. Where in an action against a steamboat, for damages for the non-performance of a contract for the transportation of freight from Dubuque to St. Paul, the defendant offered as a witness, the master of the boat, who, being sworn on his *voire dire*, testified as follows: "I was captain and part owner at the time when the contract with the plaintiff was entered into. I have no interest in the present suit. I sold out before the present suit was instituted, and before it was thought of. Nothing was said about any claim on the part of the plaintiff, when I sold. It was not known then, that he intended any proceedings;" and was permitted to testify in chief, against the objection of the plaintiff; and where there was no evidence, showing who appeared as owners of the boat, or to whom the witness sold his interest in the boat, or upon what terms; *Held*, That the witness was properly admitted to testify. *West* v. *The Steamboat Berlin*, 532.

2. Where in an action against a steamboat, for the non-performance of a contract to transport certain pork from Dubuque to St. Paul, which contract was evidenced by five bills of lading, signed by the captain, all of which contained the words, "shipped in good order and condition," and the usual reservation of "unavoidable dangers of the river and fire, only excepted," and one of which contained the additional clause: "with the usual privileges," the petition alleged that the goods were not taken to their destination, but were stored and left at Reed's Landing, some eighty or ninety miles from St. Paul; and where the owners of the boat appeared and answered, that the pork was unmerchantable, and that the plaintiff sustained no loss by reason of the delay or otherwise; that at the time of the shipment at Dubuque, the plaintiff well knew, that the season for navigation from Dubuque to St. Paul had passed, and that the regular boats in said trade had withdrawn by reason of the lateness of the season, and the extra hazard of frost, ice, and severe weather, whereby the navigation was liable to be closed at any day; that the steamboat Berlin was a small boat, of limited capacity, not calculated by size or form for speed, and ran by daylight only, all of which was known to plaintiff; that the plaintiff, being desirous of sending a quantity of pork and flour to St. Paul, and other points, applied to the captain, to undertake the trip from Dubuque to St. Paul, and in order to induce him thereto, agreed with the captain, that if at any point on such trip, the farther navigation of the river should be found impracticable, by reason of the cold or stormy weather, or if the said captain should judge it unsafe and hazardous to proceed farther, then he might store said pork and flour, and return; that the captain, relying upon such contract, agreed to make the trip; that the plaintiff knew the goods were shipped on an open flat boat, to be towed by the steamboat, as well as on the steamboat; that at the time of making the bills of lading, the plaintiff falsely represented to said captain, that the said special privileges stated in the agreement, were specially named and written in the bills of lading; that said captain, relying upon such pretences and representations, signed the same, without any explanation; that the boat with all due diligence, according to her capacity and custom, proceeded on her voyage; that the increasing severity of the weather, and the high winds then prevailing, hindered and delayed the boat, so that on arriving at Reed's Landing, near the foot of Lake Pepin, the farther prosecution of the trip became impracticable, and said captain determined that he could proceed no farther with an open flat boat, heavily laden in tow; that there being no means of forwarding the goods, they were stored until they could proceed at the opening of navigation in the Spring; that in February, 1854, the plaintiff took possession of the pork, so stored, and forbade the defendant having any farther power or control over the same, and so discharged defendant from any farther obligation under the contract; which answer also claimed pay for the freight, *pro rata*, and the new matter in which was denied by the replication; and where it appeared from the evidence, that pork was worth from $16 to $18, at Reed's Landing, and $20 at St. Paul; that the boat had a barge

or a flat in tow, on which the freight was conveyed in part or wholly; that there was but one engineer and but one pilot, and he a *raft* pilot only, and not acquainted with the river above Lake Pepin; that the boat could run by daylight only, for some reason pertaining to herself, and not to the weather or the river; and that the freight agreed on was $1.50 per barrel; and where the captain of the boat testified as follows: "We (plaintiff and captain) both thought it might very likely happen, that the Berlin would not be able to reach St. Paul. Plaintiff said, 'if you can't get through, you can get part through.' When the boat started, plaintiff ran to the river bank, and said 'if you can't get through, try and get to Charley Reed's, and deliver the goods there—he is the best man.'" And where the court instructed the jury as follows: "Although it is a general principle, that a written contract cannot be varied by parol evidence of instructions given before, or at the time the contract is executed, because all the terms of the agreement are supposed to be expressed and fixed by the instrument; yet you may take into consideration the instruction of the plaintiff to the captain, to store the goods at Reed's Landing, in the event he should be unable to go farther, for this is not a variation or contradiction of the written contract. I say, that so far as it would go to show, that the defendant was entitled to store the goods, if it was impossible for the boat to proceed farther, because of the dangers of the river and the closing of navigation, it would not be a variation, but on the contrary, as rather supporting it, for the bill of lading excepts the unavoidable dangers of the river, and reserves the 'usual privileges,' which is admitted to be the privilege of storing, when, by reason of unavoidable danger from ice, the farther prosecution of the voyage is impracticable;" to which the plaintiff excepted; *Held*, 1. That the danger of interruption of the navigation, entered into, and became a part of the contract. 2. That a boat taking freight in November, to carry from Dubuque to St. Paul, is bound to transport it to that place; but it is not *necessarily* bound to convey it there during the *same season*. 3. That if the navigation becomes *impracticable*, in consequence of the cold, the storms, or the ice of the season, the boat is excused from *then* fulfilling the contract, either on the ground of the act of the Higher Power, or because of the nature of the contract, and the contingencies which may well come within the contemplation and foresight of the parties, or in view of the clause excepting the unavoidable dangers of the river. 4. That under one or the other of these views, the boat had a right to stop and turn about, *if the voyage became impracticable*. 5. That the declarations of the plaintiff, as proven by the captain, were not to be viewed as varying the contract, or changing the liability of the boat, but were to be regarded only as directions *with whom* to store the goods, if the boat was obliged to stop. 6. That the instruction contained nothing but what pertained to the contract. *Ib.*

3. Where in such a case, the court instructed the jury as follows: "If at the time the goods were shipped, the plaintiff knew the character and capacity of the Berlin, and that it was necessary for her, in order to carry this freight, to tow in flat boats, and that she could run only in daylight, it would be your duty to consider that the contract was entered into by both parties, in reference to these things; and the plaintiff can only demand that the boat should make such speed as such a boat could reasonably make, and encounter only such obstacles and risks as she could encounter with safety. The question is not, what could a larger and better boat have done, but what could this boat have done, with due diligence? and this will refer, not only to the time when the goods were stored, but to any subsequent time during the season;" *Held*, That the instruction was erroneous, and should not have been given. *Ib.*

4. And where in such a case, the plaintiff requested the court to give the following instructions: "That it was the duty of defendant to have a boat, staunch, strong, and fit for the business of transporting freight from Dubuque to St. Paul, at the season of the year when the contract was entered into. 2. That it was the duty of the defendant, to have officers, engineers, and crew, suffi-

of Lee county illegal and void, and to restrain him from taking stock in the name of the county in three several railroad companies, and from issuing the bonds of the county in payment thereof, the petition alleged, that the said county judge was about to subscribe stock for the use and benefit, and in the name of the county of Lee, in three several railroad companies (naming them), to the amount of $150,000, in each, and to issue the bonds of the county for that sum, payable in twenty years, with eight per cent. annual interest, payable semi-annually in the city of New York; that to provide for the payment of the interest and principal of said bonds, it was proposed to levy an annual tax of one per centum on the real and personal property of the citizens of said county, so long as the same may be necessary for the object intended; that the county judge claimed to exercise this right and authority by virtue of certain proceedings, which are set out in the petition, from which it appears that at a special election, directed to be held at the usual places of holding elections in Lee county, on the 10th of September, 1856, the electors of said county were required to determine by their votes, whether the county of Lee should subscribe for stock to the amount of $150,000 in each of three railroad companies, (naming them); the said stock to be paid in the bonds of said county, bearing interest at the rate of eight per centum per annum, and whether in addition to the usual taxes, an annual tax of not exceeding one per centum on the taxable property of the county, to be continued from year to year, so long as the same was required, should be levied, to be applied to the liquidation of the principal and interest of the bonds aforesaid; that the electors were required to vote on each proposition for the subscription to the stock of each of said railroad companies, separately; that it was stipulated in the proposition submitted, and the notice given to the electors, that a majority of the votes given for each proposition for subscription of stock, should be considered as an adoption of the same; but that the subscription should not be made to either of said companies, unless there should be a majority of the votes cast in favor of each and all of them; that on the 26th of September, 1856, the county judge being satisfied that all the requirements of the statute in regard to said election, had been substantially complied with, and that a majority of the votes cast at said special election, were cast in favor of the subscription to the stock of each and all of said railroad companies, caused the propositions aforesaid, and the result of said election, to be entered at large in the minute book of the county court, as required by law, in order to give said vote and the entry thereof on the county records, the force and effect of an act of the General Assembly of the state of Iowa, which petition was demurred to; and where the court sustained the demurrer, and dismissed the petition; *Held*, That the court erred in sustaining the demurrer, and dismissing the petition. *Ib.*

SURETY TO KEEP THE PEACE.

1. The failure of a justice of the peace, where a party is charged with threatening to commit an offence against the person or property of another, to reduce the evidence to writing, and cause the same to be subscribed by the witnesses, as required by section 2781 of the Code, furnishes no good reason for dismissing the proceedings, on motion, in the District Court. *Gribble* v. *The State*, 217.

2. The jurisdiction of the District Court, in such cases, is in no sense in the nature of an appeal from the judgment or decision of the justice. *Ib.*

3. The justice, if he requires the defendant to give security to keep the peace, will be presumed to have exercised his authority properly. *Ib.*

4. The inquiry in the District Court is as to whether there is *still* any just reason to fear the commission of an offence against the person or property of the complainant. *Ib.*

TIME.

TITLE.

TRESPASS.

WRIT OF ERROR.

END OF VOL. THREE.